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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-617

ELMER GERTZ,

Petitioner,

vs.

ROBERT WELCH, INC.,

Respondent.

APPENDIX

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DOCKET ENTRIES

6-17-69—Filed complaint with Exhibits "A and B" and 1 copy.

6-17-69—Filed Designation.

6-17-69—Filed Affidavit under Rule 39.

6-18-69—Issued summons and 1 copy with 1 copy of complaint.

8-12-69—Filed summons returned executed.

9-11-69—Ordered that the above entitled case is set for a status report on Wednesday, October 8, 1969, at 10 A.M.—Decker, J.

9-12-69—Mailed Notices.

9-15-69—Filed Stipulation.

9-15-69—Filed defendant's motion for leave to file its appearance.

9-15-69—Filed defendant's Motion to Dismiss.

9-15-69—Filed appearance of defendant and that of its attorney.

9-15-69—Filed Affidavit under Rule 39.

9-15-69—Stipulation, leave to file appearance and motion to dismiss instanter. Defendant to file Brief in Support of Motion to Dismiss by September 29, 1969. Plaintiff given 20 days to file response and defendant 5 days for reply.—Decker, J. Mailed Notices 9-16-69.

9-15-69—On Court's own motion, cause taken off Status Call for October 8, 1969.—Decker, J. Mailed Notices 9-16-69.

9-29-69—Filed Brief in Support of Defendant's Motion to Dismiss.

10-20-69—Filed Plaintiff's Memorandum in Opposition to Defendant's Motion to Dismiss.

10-22-69—Filed Reply Brief in Support of Defendant's Motion to Dismiss with attachment.

11-18-69—Filed Memorandum Opinion.

11-18-69—Memorandum Opinion filed. Order defendant's motion to dismiss is hereby denied.—Decker, J. Mailed Notices 11-19-69.

12-29-69—Filed interrogatories to defendant Robert Welch, Inc.

12-30-69—On the Court's own motion, the above cause is set for a report on status on Wednesday, January 7, 1970, at 10 A.M.—Decker, J.

1-7-70—Defendant time to answer extended to February 15, 1970 and cause set for pre-trial conference on March 9, 1970 at 9:30 A.M.—Decker, J. Mailed Notices 1-8-70.

2-13-70—Filed defendant's Answer to Complaint.

3-9-70—Pre-trial conference held. Order discovery cut off by May 4, 1970 and final pre-trial conference set that date at 9:30 A.M.—Decker, J. Mailed Notices 3-10-70.

4-30-70—Filed Plaintiff's Notice; Motion.

4-30-70—On motion Plaintiff, Protective Order entered limiting scope of examination as to speeches and writing for period of 20 years. Pre-trial conference reset to June 2, 1970 at 9:30 A.M.—Decker, J. Mailed notice 5-1-70.

4-30-70—Filed defendant's answers to interrogatories.

6-2-70—Pre-trial conference held. Cause set for trial on September 14, 1970 at 10 A.M.—Decker, J. Mailed notices 6-3-70.

9-14-70—Filed Motion to postpone trial date extension of time defendant's Discovery.

9-14-70—Filed Motion to file amended answers.

9-14-70—Filed Notice.

9-14-70—Filed defendant's motion for summary judgment.

9-14-70—Filed Plaintiff's motion for summary judgment.

9-14-70—Parties given leave to file motions for Summary Judgment. Cause reset to September 21, 1970 at 10:00 A.M. for trial.—Decker, J. Mailed notices 9-15-70.

9-14-70—Filed Plaintiff's deposition of Elmer Gertz.

9-16-70—Plaintiff's motion to reset trial to September 23, 1970 is denied. —Decker, J. Mailed notices 9-17-70.

9-16-70—Filed Amended answer of defendant.

9-16-70—Filed Memorandum opinion of Judge Decker.

9-16-70—Memorandum opinion filed. Ordered that plaintiff's and defendant's motions for summary judgment are denied; trial date reset to September 21, 1970; discovery to remain open until that date; defendant's motion for leave to file amended answer is granted.—Decker, J.

9-8-70—Pre-trial conference held. Decker, J. Mailed notices 9-21-70.

9-21-70—Filed stipulation.

9-21-70—Filed defendant's trial brief.

9-21-70—Filed plaintiff's trial memorandum.

9-21-70—Filed plaintiff's notice to produce documents.

9-21-70—Filed defendant's motion in limine.

9-21-70—Cause called for trial. Defendant's motion for continuance denied. Motion Sun-Times to quash supoena granted. Following jurors selected and sworn: Carolyn T. Tredwell, Adolph B. Oleckno, Robert Williams, Valeria J. Pawlak, Daniel T. Elston, Frank Schmidt, Kenneth P. Brownlee, Phyllis Scherndahl, Dolores R. Kleffe, Joseph M. Koyden, George S. Iny, Russell Dethlefsen. Parties stipulate, in case one but not more than two jurors excused for good cause, trial may proceed before remaining panel with full force

and effect. Opening statements made. Evidence heard on behalf of plaintiff in part and cause continued to September 22, 1970 at 10 A.M.—Decker, J. Mailed notices 9-22-70.

9-21-70—On motion plaintiff, order paragraph 3 of amended answer as to paragraph 3 of Count 1 and paragraph 3 of count II of complaint hereby stricken.

Paragraph 1 and 2 of the first separate defense of said amended answer are stricken. Motion to strike paragraph 7 of the first separate defense of said amended answer is denied.

Second separate defense of said amended answer is stricken. (DRAFT)—Decker, J. Mailed notices 9-22-70.

9-22-70—Filed stipulation.

9-22-70—Filed plaintiff's additional trial memorandum.

9-22-70—Filed plaintiff's motion in limine.

9-22-70—Filed refused instructions.

9-22-70—Filed given instructions.

9-22-70—Further evidence heard on behalf of plaintiff. Plaintiff rests. Evidence heard on behalf of defendant. Defendant rests. Both sides rest. Final arguments heard. Court instructs the jury. Marshal sworn and jury retires to consider their verdict. Parties stipulate to sealed verdict to be opened following day of Court.—Decker, J. Mailed notices 9-23-70.

9-22-70—Order directing U.S. Marshal to provide dinner for twelve jurors and one deputy Marshal.—Decker, J. Mailed notices 9-24-70.

9-23-70—Filed verdict.

9-23-70—Sealed verdict opened in Court. Jury returns following verdict: "We, the Jury, find the defendant guilty and assess the plaintiff's damages at the sum of $50,000.00."

Judgment entered on the verdict in favor of plaintiff and against defendant for damages in amount of $50,000.00 and costs.—Decker, J. Mailed notices 9-24-70.

9-23-70—Enter judgment on the jury verdict—by the Clerk.

10-1-70—Filed Supersedeas Bond No. 4325423 in the sum of $55,750.00.

10-2-70—Filed Notice of Motion.

10-2-70—Filed Motion.

10-2-70—Filed Motion for judgment notwithstanding the verdict and in the alternative motion for a new trial.

10-2-70—Order approving supersedeas Bond.—Decker, J. Mailed notices 10-5-70.

10-2-70—Plaintiff given leave to file post trial motion and two weeks to file brief in support. Defendant given 10 days to answer and plaintiff 5 days to reply.—Decker, J. Mailed Notices 10-5-70.

10-16-70—Filed Defendant's Brief in support of motion for judgment notwithstanding the verdict and in the alternative motion for new trial.

10-26-70—Filed Plaintiff's memorandum in opposition to defendant's Motion for judgment notwithstanding the verdict and in the alternative motion for new trial.

12-8-70—Filed Memorandum opinion.

12-8-70—Memorandum opinion filed. Judgment notwithstanding verdict should be entered for the defendant. Motion for a new trial is conditionally

denied. Accordingly verdict for plaintiff is set aside and defendant's motion for judgment notwithstanding the verdict is granted.—Decker, J. Mailed notices 12-10-70.

2-14-70—Filed notice of appeal filed by the plaintiff-appellant.

2-14-70—Filed bond on appeal in the amount of $250.00.

2-16-70—Mailed copy of notice of appeal to Mr. James A. Boyle, Jr. and Mr. Wayne B. Giampietro.

1-1-71—Filed defendant-appellant notice of appeal.

1-11-71—Filed Defendant's Notice of Motion.

1-11-71—Filed Defendant's Motion re service by plaintiff of the issues which he intends to present on appeal.

1-11-71—On motion defendant, order plaintiff to deliver to defendant his statement of issues he intends to present on appeal, Defendant's time to cross designate transcripts of record for additional 10 days. Time for transmission of record on appeal extended to February 16, 1971.—Decker, J. Mailed notices 1-12-71.

2-8-71—Filed defendant's exhibits A to H.

1-18-71—Filed stipulation.

1-18-71—Filed designation of transcript of proceedings.

2-16-71—Filed plaintiff's exhibits.

2-16-71—Clerk's file copy of transcript of proceedings had on September 14 and 21, 1970 before Judge Decker, filed by the official court reporter.

2-16-71—Filed motion of plaintiff for motion for extension of time.

2-16-71—Enter order extending time within which record on appeal is to be filed to and including March 2, 1971—Napoli, J. Mailed notices 2-17-71.

[7-16] COMPLAINT

Plaintiff, Elmer Gertz, by his attorney, Wayne B. Giampietro, complaining of defendant, Robert Welch, Inc., a Massachusetts corporation, alleges as follows:

1. Plaintiff is a citizen of the State of Illinois. Defendant Robert Welch, Inc., is a corporation incorporated and existing under the laws of the State of Massachusetts, having its principal place of business in Belmont, Massachusetts. The matter in controversy exceeds, exclusive of interest and costs, the sum of Ten Thousand Dollars ($10,000.00).

2. There is complete diversity of citizenship herein and this Court has jurisdiction of this action under 28 U.S.C. §1332(a)(1).

3. Plaintiff was born in Chicago, Illinois, and has lived his entire life in this city, except for a few years in his youth, in Cleveland and a few months, during his college years, in Brooklyn. He was educated in the public schools of Chicago, except for the few years he spent in Cleveland. He attended the University of Chicago for six years, receiving his bachelor's degree (Ph.B.) in 1928 and his law degree (J.D.) in 1930. He is married and has children and grandchildren who reside in the Chicago area. His family, friends, acquaintances, colleagues and clients live, for the most part, in the Chicago area. He belongs to professional, literary, historical, religious, educational, philanthropic and civic organizations in the Chicago area and has held numerous offices, including that of president, in such organizations. He belongs to the American, Illinois State, Federal, Seventh Circuit and Chicago Bar Associations, Appellate Lawyers Association of Illinois, and the Decalogue Society of Lawyers, and has served

on the committees of these groups and has been president of the latter organization. He has received awards and citations for public services from several groups. He has written books, pamphlets, articles and reviews, some of his work appearing in leading newspapers, magazines an encyclopedias. Biographical notices of him appear in several standard reference works, including *Who's Who in America, Who's Who in the Midwest,* and *Contemporary Authors,* all of which are readily available to the public as a whole, including defendant.

4. Plaintiff was admitted to the practice of law by the Supreme Court of Illinois in 1930 and has practiced, and is practicing, his profession since then before all of the courts of this State and in courts of other jurisdictions. He has been admitted to practice before the United States District Court in Chicago and Detroit, the United States Court of Appeals for the Seventh Circuit, and the United States Supreme Court, and various governmental agencies. He has been specially permitted to practice as a lawyer in cases in various parts of the country.

5. At all times plaintiff has deservedly enjoyed a good reputation as a lawyer and citizen, continuously throughout his career, and has always been thought of and has always been a loyal and respected citizen of the United States, and has never been thought of or accused of being disloyal to the United States or to its system of government.

6. Sometime prior to March 22, 1969, defendant caused to be written, printed, published and distributed to the public at large, a certain pamphlet containing an article entitled "Frame-Up, Richard Nuccio and The War on Police," a copy of which is attached hereto as Exhibit

"A" and incorporated by reference as though fully set forth herein.

7. This said article purports to be a "reprint" of an article which "first appeared in the April, 1969, issue of American Opinion", but said "reprints" were distributed to the public in the City of Chicago, Illinois prior to the time at which the April, 1969, issue of American Opinion was available for purchase in the said City of Chicago, Illinois.

8. Copies of the said pamphlet have been shipped to various groups, organizations and individuals within the State of Illinois by defendant and, with the knowledge and approval of defendant, have been distributed to the public at large by said groups and individuals within this State, which is the State where plaintiff lives and carries on his profession. The said article is of and concerning a series of events and alleged events that occurred within the City of Chicago, State of Illinois, where the person who wrote said article for defendant came to obtain the statements placed in said article.

9. Defendants have continued their distribution of this said pamphlet in Illinois up to the present time, the latest said distribution to the public being on June 15, 1969, at Oak Brook, Illinois, at a gathering of the John Birch Society, at which the principal speaker was Robert Welch.

10. In the said article appear the following untrue and defamatory statements, among others, of and concerning plaintiff:

a) p. 5

"The file on Elmer Gertz in Chicago Police Intelligence takes a big, Irish cop to lift. According to the *Communist Worker* of December 8, 1964, he has

signed a petition to abolish the House Committee on Un-American Activities. On May 12, 1966, he sponsored another such petition, published by the Illinois division of the American Civil Liberties Union —founded by Harry F. Ward, one of the top Communists in the United States. Gertz was also a pallbearer for Jack Ruby, the 'lone fanatic' who killed the 'lone fanatic' who killed the President of the United States. He has been an official of the Marxist League for Industrial Democracy, originally known as the Intercollegiate Socialist Society, which has advocated the violent seizure of our government."

b) pp. 5-6

"The Communist parade in April included the usual Communist violence. Apparently, the traitors were practicing for what they planned to do in August. And just as the phony Walker Commission and its *Walker Report* followed the terrorism in August, so a Commission and a report called *Dissent and Disorder* followed the terrorism in April, financed by the Roger Baldwin Foundation of Communist Harry Ward's A.C.L.U. After an 'impartial investigation,' the A.C.L.U.'s Commission ridiculed 'the inaccurate impression that the April 27 event was a left-wing affair'; exonerated the Communist Chicago Peace Council, which ran it; and naturally blamed the violence the Communists caused on the Chicago police: 'On April 27, at the peace parade of the Chicago Peace Council, the police badly mishandled their task. Brutalizing demonstrators without provocation, they failed to live up to that difficult professionalism which we demand.'"

"And the Chief Counsel for the Commission which committed *Dissent and Disorder* was the same Elmer Gertz who now turns up as lawyer for the Nelsons in the attack on Officer Nuccio."

"In fact, the only thing Chicagoans need to know about Gertz is that he is one of the original officers, and has been Vice President of the Communist National Lawyers Guild—which has been described by the House Committee on Un-American Activities as 'one of the foremost legal bulwarks of the Communist Party'—and which probably did more than any other outfit to plan the Communist attack on the Chicago police during the 1968 Democrat Convention."

c) p. 9

Below a photograph of Elmer Gertz there appears the following: "Elmer Gertz of Red Guild harasses Nuccio."

d) p. 10

"Like millions of other Americans, he was watching an organized attempt to discredit our local police —organized primarily by the Communist National Lawyers Guild, preeminent in which is the same Elmer Gertz who now appears as the Nelsons' lawyer."

e) p. 12

"The C.P.C., as you will recall, is the Communist outfit headed by a Communist and defended by Leninist Elmer Gertz, who now turns up as lawyer for the Nelsons."

f) p. 17

"Two Chicago Assistant Corporation Counsels warned Nuccio not to testify at the coroner's inquest, for fear what he said might jeopardize their defense against Communist-fronter Gertz."

11. The said libelous publications are intended by defendant to,and do in fact, depict and represent plaintiff to his clients, his colleagues, the courts, and the public in general in Illinois and elsewhere as a believer in, a follower and advocate of Communism and Leninism, a member of or affiliated with the Communist Party and

organizations controlled by it, a leader of or a participant in Communist conspiracies, and enemy of the government, a believer in force, a revolutionary and an enemy of law and order, all and each of which statements and charges were and are utterly false and untrue and were known by the defendant to be false and untrue at the time of printing said article. Such false and libelous publications are intended to hurt plaintiff in his professional reputation and practice as a lawyer and as a citizen and to prejudice him in his relations with his clients, colleagues, the courts, and the community and public generally. As a lawyer he is particularly sensitive to such false and defamatory charges.

12. In particular, plaintiff has never been connected in any way with the Marxist League for Industrial Democracy, the League for Industrial Democracy, or the Intercollegiate Socialist Society. Plaintiff was not one of the original officers of what defendant styles the "Communist National Lawyers Guild" or the National Lawyers Guild. During the period when plaintiff was a member and officer of the National Lawyers Guild, its membership included lawyers of great reputation, and public officials and jurists of the highest rank, including some who became Justices of the Supreme Court of the United States. Its conventions and other meetings were attended and addressed by Presidents of the United States and others of great stature and reputation. Plaintiff has not been connected in any way with said National Lawyers Guild for over fifteen years. Plaintiff has never been connected in any way with the Chicago Peace Council.

13. The bad faith and malice of defendant is shown by the fact that neither it, nor anyone connected with it, nor the author of the defamatory article, nor anyone in

their behalf, made any inquiries whatsoever of plaintiff, his family or associates as to any of the matters and things set forth in the said article. Defendant made no effort to verify any of the false and defamatory allegations contained in said article, but either relied upon the barest and barest hearsay and misrepresentations or completely fabricated such statements.

14. A principal theme of defendant's said article is that police Officer Richard Nuccio was "framed" on a charge of murder by several persons, apparently including the Judge, the State's Attorney, various witnesses, and plaintiff. Since Nuccio's appeal from the murder conviction is now pending in the Supreme Court of Illinois and since the suits filed in behalf of the victims of Nuccio's acts are pending in this and other courts, plaintiff expressly excludes at this time, without waiving any rights with respect thereto, the allegations of the said article with respect to Nuccio, confining himself herein without waiving any rights with respect thereto, to the other defamatory statements made by defendant against him, which do not involve the consideration of the Nuccio suits. Of course, plaintiff expressly denies that there was, or is, any conspiracy to frame Nuccio for any crime whatsoever and denies that he was, or is, involved in any way in any such alleged conspiracy.

15. The conviction of Richard Nuccio for murder is presently pending on appeal before the Supreme Court of the State of Illinois as are three suits growing out of the acts of Richard Nuccio and June 4, 1968, one presently pending before the United States District Court for the Northern District of Illinois, one presently pending before the Circuit Court of Cook County, Illinois, and one presently pending before the Appellate Court of Illinois.

The publication of the said article by defendant at this time while said suits are pending before various courts of law is an attempt on the part of defendant to interfere with this said litigation and to prejudice the parties thereto, including those persons represented by plaintiff and to interfere with the process of these said courts. These acts are a further indication of the malice of defendant against plaintiff.

16. As a result of the said article, plaintiff has been, and is, or may be, injured in his good name, credit and reputation, both as an individual and as an attorney at law. At the present time plaintiff does not know how much actual damage he has suffered as a result of this said article, and, therefore, seeks only nominal actual damages. However, the actual malice and viciousness of said article, entitles plaintiff to a large amount of punitive damages.

Wherefore, plaintiff demands judgment against defendant in the sum of Ten thousand and one dollars ($10,001.00) actual damages and Five hundred thousand dollars ($500,000.00) punitive damages and his costs of suit herein and such further or different relief as to this Court appears to be just.

Count II

1-5. Plaintiff incorporates as though fully set forth herein, paragraphs 1 through 5 of Count I as paragraphs 1 through 5 of this Count II.

6. Sometime prior to March 24, 1969, defendant caused to be written, printed, published and distributed to the public at large a certain magazine entitled "American Opinion," issue of April, 1969, which said magazine contained an article entitled "Frame-Up, Richard Nuccio And

the War on Police," a copy of which is attached hereto as Exhibit "B" and incorporated by reference as though fully set forth herein.

7. This said magazine has been shipped by defendant to various bookstores, newsstands and other distributors of magazines within the State of Illinois and, with the knowledge and approval and with the assistance of defendant, has been distributed to the public at large by said groups and individuals within this State, which is the State where plaintiff lives and carries out his profession, and the said article is of and concerning a series of incidents which occurred within the City of Chicago, State of Illinois, which is where the person who wrote said article for defendant came to obtain the statements which he placed in said article.

8. Plaintiff incorporates as though fully set forth herein paragraph 10 of Count I as paragraph 8 of this Count II.

9. In addition to said statements in said article, there appear on the inside front cover of the April, 1969, edition of "American Opinion", the following statements:

> ". . . But we do know that when *American Opinion's* Alan Stang goes after the facts in a story he gets them—just as he has, again, in the very important article beginning on page one.
>
> "Mr. Stang reports this month on the framing for murder of an outstanding Chicago police officer—a man with no less than twenty-six formal citations for the excellence of his police work. That this is a part of the Communist war on our police is as certain as the innocence of the officer they have chosen as their symbolic target. So important is this one, in fact, that reprints will be made immediately available."

10-15. Plaintiff incorporates as though fully set forth herein paragraphs 11 through 16 of Count I as paragraphs 10 through 15 of this Count II.

Wherefore, Plaintiff demands judgment against defendant for the sum of Ten Thousand and one dollars ($10,001.00) actual damages and the sum of Five hundred thousand dollars ($500,000.00) punitive damages and his costs of suit herein, and such further or different relief as to this Court appears to be just.

/s/ Wayne B. Giampietro
Attorney for Plaintiff

FRAME-UP

Richard Nuccio And The War On Police

by

Alan Stang

ABOUT THIS ARTICLE

These reprints of FRAME-UP — RICHARD NUCCIO AND THE WAR AGAINST THE POLICE, by Alan Stang, will be sent postpaid to any address in the United States, at the following prices:

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Belmont, Massachusetts 02178

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FRAME-UP

Richard Nuccio And The War On Police

Alan Stang *is a former business editor for Prentice-Hall, Inc., and a television writer, producer, and consultant. Mr. Stang is a frequent contributor to* AMERICAN OPINION *and is author of the Western Islands best-sellers,* It's Very Simple *and* The Actor. *Alan Stang has just returned from an investigative trip to Chicago, where he conducted extensive research into the Richard Nuccio Case.*

■ ON THE night of June 4, 1968, Mr. Benjamin Citron, who owns Franksville, next to Wrigley Field in Chicago, saw Mr. Ronald Nelson a few feet away through the window, sitting at the table just outside the glass. Citron knew Nelson well. He was a regular at the restaurant, and a leader of a gang of toughs who liked to draw obscene pictures on the tables. They had first met about two years before, when Nelson and an accomplice used Franksville's washroom to store a cache of marijuana and pep pills, which Citron reported to police before Nelson could reclaim it.

Some time later, Nelson returned to Franksville under the influence of drugs, greeted Citron as follows: "You lousy Jew"; hit Citron and knocked off his glasses. This is probably the place to mention that the hoodlum named Nelson was at the time a "youngster" of seventeen, and Citron a man in his middle fifties.

In Boys Court, Judge Saul Epton persuaded Mr. Citron to withdraw his charges, in exchange for which he ordered Nelson to stay away from Franksville. But the young hood didn't stay away. When Mr. Citron had seen him there, he had reminded Nelson of the Judge's order. And Mrs. Citron had called his mother, who said she couldn't "do a thing with him." So it went, society excusing Ronald Nelson on the modern theory that crimes are caused not by criminals but by punishment; that you are to blame when your car is stolen. You see Nelson's arrest record – part of it – reproduced on page four.

So Ronald Nelson's mere presence at Franksville on the night of June 4, 1968, was a violation of an order issued by a Judge. And when Citron saw him he was afraid; not just because Nelson was so obviously drunk, but because he was staring at Citron from a few feet away through the window – playing all the while with a *knife.*

As he had so many times, Ben Citron called the police.

At about 9:40, a marked police car arrived with uniformed Officers Ronald Rothmund and Richard Nuccio; and then an unmarked car with Plainclothesmen Kenneth Hyatt and Joseph Sand. Nuccio also knew Nelson well. On June 11, 1967, for instance, a year earlier, Nelson had not only been at Franksville again – in violation of Judge Epton's order – but was one of a group throwing stones at the premises, a favorite pastime. When Officer Nuccio, who happened to be eating there, went to the aid of another Officer who tried to quiet them, Nelson and the others had attacked Nuccio using a board as a club and sent him to the

hospital for X-rays and treatment. Nelson and the others had been arrested of course, but were released at the station by Captain John Lennon, because they had been giving the police information about burglaries – information it is easy to believe they had.

On the night of June 4, 1968, Officer Rothmund was the first man to reach Nelson and saw the hoodlum with the knife. And as he had so many times when the police arrived because of his presence, Nelson ran, this time into an alley behind Franksville. Rothmund shouted to his fellow Officers to stop him, loudly warning that Nelson had a knife. Officer Nuccio, followed closely by Hyatt, pursued the hoodlum into the alley, trailing by twenty or twenty-five feet.

Nelson slowed, cocked his arm and turned slightly to the right.

"Look out!" yelled Hyatt, "he's going to throw the knife!"

Hyatt dove for cover. Nelson threw the knife at Officer Nuccio. The Officer drew his revolver, went to one knee and fired. The knife shot over Nuccio's head, and was retrieved by Officer Hyatt.

Nelson died in a hospital a few minutes later. His body was found to contain 71 mg. percent of ethanol. Indeed, in the coroner's report on the death of this nineteen-year-old, we read that the "significant conditions contributing to death" were not only Nuccio's bullet, but a case of "acute alcoholism."

You will see reproduced, on page seven, one of twenty-six Honorable Mentions won by Officer Nuccio for his fearless police work since his appointment to the force in December, 1966 – an average of better than one per month.

This time, Nuccio received no Honorable Mention. No, instead he has been convicted of murder and sentenced to at least fourteen years in prison.

I

It seems that the friends of the young alcoholic and hoodlum followed him to the hospital, where they made a disturbance which required the police. On the next day, Mr. Citron of Franksville was threatened by telephone and had to be given police protection. That night, some "youngsters" were arrested at his restaurant with a sign which threatened: "Die, Nuccio, die, Nuccio. If the courts don't get you, we will." They picketed Officer Nuccio's house, yelling "Killer." And such friends of Nelson's as Noel Kitchen, John Ahrens, George Bish, and Trena Ciabay began holding private meetings, at the home of Judy Rankin, for instance, on Belle Plaine, where they got some expert public relations and legal assistance, resulting, for example, in a leaflet headed: "We don't like the Nelson killing."

On July eleventh, this young gang appeared in force at a regular board meeting of the Lake View Citizens' Council, a local organization whose members have varying political views. And with the assistance of Gene De Roin, Chairman of L.V.C.C.'s Human Relations Committee, and its second Vice President, Reverend Carl Lezak of St. Sebastian's School where the meeting was held, they engineered an L.V.C.C. endorsement of a resolution calling for Officer Nuccio's suspension – and another calling for an L.V.C.C. public hearing about the police in general and Nuccio in particular.

Nelson's friend Bish is intensely interested in the police. A few days later, he was arrested as one of a gang which sent another Police Officer, M. A. Rosenthal, to the hospital with serious injuries.

On July twenty-second, the public hearing was held at the Lake View Presbyterian Church – two days before the inquest. Voices in the audience called for Nuccio's arrest, for disarming the police, and for a civilian review board – one-third of whose members would represent "youth," and which would have the power to suspend and fire policemen. John P. Fahey, Commander of the Town Hall Nineteenth Police District, and

Officer Richard Nuccio, shown here with one of his three children, was framed for murder.

Officer Nuccio's boss, told the crowd: "Right or wrong, you obey a policeman" – which Gene De Roin later told me was "irrational," and the wrong way to communicate with the "youth." Many in the crowd jeered the Commander. Some stood and yelled "Sieg heil!"

Revolutionary agitators were now hard at work to "Get Richard Nuccio."

As one of the teenagers' attorneys put it, according to the *Chicago Seed:* "No one is bound by the findings of a Coroner's Inquest. However, it is up to the community to exert whatever power it can on the existing investigating bodies, preferably before the 24th."

The *Seed* is an "underground," Marxist, revolutionary newspaper which pushes drugs and of course degeneracy. It naturally opposes our local police and came out strongly against Officer Nuccio. So did the September, 1968, issue of the *Movement,* which calls policemen "pigs" and says it is affiliated with the Communist Student Nonviolent Coordinating Committee and the terrorist Students for a Democratic Society:

About twenty people were at the hot dog stand the night Richard Nuccio, cop, shot Ron Nelson, 19, in the back, coldly, deliberately, from about 60 feet, on June 4, in Chicago. Ron was running down an alley, running because he had been harassed by Nuccio before and was afraid of what could happen that night. The owner of the stand had called the police because he hates the kids and wanted to get them off his place. No fight, no looting, no disturbance, nothing had provoked the shooting.

Yes, the Comrades now had the line: Get Richard Nuccio!

Then there was the Lake View Youth Council, which speaks in a flyer of a "police-youth communication breakdown," and of the feeling of "the youth" that the Nineteenth District police have "declared war on them and that's exactly what it is, a war caused by lack of compassion, sensitivity and understanding. A committee of the Youth Coun-

cil is probing deeper into the matter."

We read that the purpose of the Youth Council is to organize the youth. It will offer its members legal aid. And the flyer paraphrased the Communist Black Panthers: "The major theory behind the youth council is 'youth power.' . . ."

Also circulating in the neighborhood at the time was a *Community Newsletter*, written and published by "concerned adults," who speak of an "undeclared war between the police and the teen-agers," and call for a civilian police review board – which is a standard Communist ploy.

Part of the arrest record of hoodlum Nelson.

"A child has been killed!" writes Les Paul in this incendiary sheet. "The killer, a cop, roamed the street, still in good standing, until the city acted to over-rule the commander of *our* district. *Our* district police see no need to be responsible to the people! *Our* district people see youth as their enemy! *Our* district police feel free to harass, to threaten, to brutalize anyone they don't like, and *our* district police find most of us they don't like especially kids."

Indeed, says Mr. Paul: "A community that attacks its own children is sick; those who carry out these attacks are no better than mad dogs . . . ."

Get it: The police are "mad dogs."

And there is a college student named Carol Whiting, who wrote as follows of the matter some time later in a revolutionary "Wallpaper": "The youth in Lakeview have taken a step in the right direction. It's only a beginning, though. The time has come when youth all across the country – in school and out – must start demanding – not asking for – what's rightfully theirs. We can no longer sit back and ask for favors. We must demand equal rights and be willing to fight for them whether it be in the courts or in the streets."

Elsewhere in the same "Wallpaper," we read: "LeRoi Jones tells the Man: Up Against the Wall, Mother f****r: This is a Stick-up!

"Who are we sticking up? That's important to know. Sure we have to fight the pigs when they attack and when they protect the city for the people. But the pigs only carry out orders (though often as brutally as possible). * * * The cops don't run the show; they're not the main enemy. We must move the fight on from anti-pig to anti-imperialist pig."

The article urges readers to call the terrorist Students for a Democratic Society.

In short, the Nelson incident was used by revolutionaries of the Far Left to try to turn the people against the police – and vice versa – at a time when criminals with official sanction are tearing our country apart.

II

BY now you are thinking that there is more to this matter than some teenagers hanging around a hot dog stand. Teenagers at a hot dog stand would not know how to arrange the carefully orchestrated publicity the case soon acquired. And of course you are correct. They wouldn't.

But Elmer Gertz for instance would.

On behalf of the Nelson family, attorney Gertz has filed three suits against Officer Nuccio and the City of Chicago, two in state court and one under the Federal Civil Rights Act, asking for a total of almost a million dollars.

The file on Elmer Gertz in Chicago Police Intelligence takes a big, Irish cop to lift. According to the Communist *Worker* of December 8, 1964, he has signed a petition to abolish the House Committee on Un-American Activities. On May 12, 1966, he sponsored another such petition, published by the Illinois division of the American Civil Liberties Union – founded by Harry F. Ward, one of the top Communists in the United States. Gertz also was a pallbearer for Jack Ruby, the "lone fanatic" who killed the "lone fanatic" who killed the President of the United States. He has been an official of the Marxist League for Industrial Democracy, originally known as the Intercollegiate Socialist Society, which has advocated the violent seizure of our government.

On April 27, 1968, the Chicago Peace Council conducted a "peace parade," as part of an operation coordinated around the country by the National Mobilization Committee to End the War in Vietnam, a Communist outfit headed by Communist David Dellinger – which also coordinated the terrorist attack on the police at the Democrat Convention in August. The Chicago Peace Council is also a Communist outfit. It is headed by a Communist named Jack Spiegel. Its headquarters are at 1608 W. Madison in a building owned by Communist John Rossen, an official of the defunct Communist Fair Play for Cuba Committee. Also headquartered in the building is the Communist S.D.S. Indeed, the Chicago Peace Council chose a former National Secretary of S.D.S. named C. Clark Kissinger to organize its Communist parade last April twenty-seventh. Kissinger, too, was later active in the terrorism against the police at the Chicago Convention.

The Communist parade in April included the usual Communist violence. Apparently, the traitors were practicing for what they planned to do in August. And just as the phony Walker Commission and its *Walker Report* followed the terrorism in August, so a Commission and a report called *Dissent And Disorder* followed the terrorism in April, financed by the Roger Baldwin Foundation of Communist Harry Ward's A.C.L.U. After an "impartial investigation," the A.C.L.U.'s Commission ridiculed "the inaccurate impression that the April 27 event was a left-wing affair";

Ronald Nelson, shot as he attacked with knife.

exonerated the Communist Chicago Peace Council, which ran it; and naturally blamed the violence the Communists caused on the Chicago police: "On April 27, at the peace parade of the Chicago Peace Council, the police badly mishandled their task. Brutalizing demonstrators without provocation, they failed to live up to that difficult professionalism which we demand."

And the Chief Counsel for the Commission which committed *Dissent And Disorder* was the same Elmer Gertz who

now turns up as lawyer for the Nelsons in the attack on Officer Nuccio.

In fact, the only thing Chicagoans need to know about Gertz is that he is one of the original officers, and has been Vice President, of the Communist National Lawyers Guild – which has been described by the House Committee on Un-American Activities as "one of the foremost legal bulwarks of the Communist Party" and which probably did more than any other outfit to plan the Communist attack on the Chicago police during the 1968 Democrat Convention.

Yes, Gertz is good at publicizing "police brutality." On July twenty-fourth, two days after the "open hearing" at the Lake View Presbyterian Church, he was active at the inquest, which had the flavor of a trial.

Five days later, Richard Nuccio was indicted for murder.

III

AT the trial, suddenly, none of the State's witnesses remembered seeing Nelson with a knife. Nobody heard Officer Rothmund warn Officer Nuccio he had one. Nobody heard Plainclothesman Hyatt warn Officer Nuccio the hoodlum was going to throw it. Instead they had decided to say they saw Nuccio fire, while standing erect – and do so when Nelson was already eighty or ninety feet away. They claimed that Officer Nuccio had kicked Nelson as he lay on the ground; that on earlier occasions he had tried to provoke the kindly Nelson by saying he had made love to his girl; had forcibly driven the gentle Nelson long distances in police cars and made him walk home; had called the pure and virtuous girls at Franksville whores; had threatened various teenagers with gun and blackjack.

One of the prosecution's witnesses had never made a statement until July seventeenth – *six weeks after the shooting.* Another was Trena Ciabay, who as you will recall had met with the others at the home of Judy Rankin, where some of the planning had been made. Another "witness" was Linda Scheel, who was one of those arrested on the night after the shooting, with the sign which threatened Officer Nuccio with death. There was John Ahrens,* who also had met with the others at the Rankins', had been convicted of possession of marijuana in 1966 – and who, on June 11, 1967, was one of those arrested for attacking Nuccio with a board, sending him to the hospital. There was Noel Kitchen, who also had participated in the planning, had threatened Nuccio in July, 1967, and once was arrested along with Ahrens, who was arrested for possession of marijuana. On the night of June 4, 1968, Kitchen heard nobody yell anything about a knife. On the contrary: "I thought I heard someone yell 'Shoot him.' "

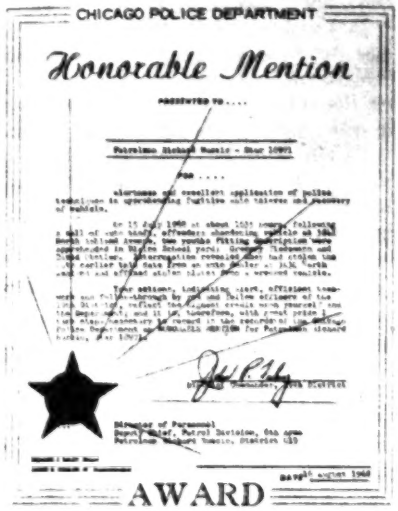
And there is Steve Austill, the State's *star* witness, who was with Nelson at Franksville that fatal night. It was Austill who told the Court for instance that Officer Nuccio had kicked the wounded Nelson. He also admitted having committed shoplifting and car theft. On February 23, 1967, he was given a year's probation for possession of marijuana. On October 26, 1967, he drew another year's probation for petty theft. Indeed, on September 5, 1968 – exactly one week after Officer Nuccio's trial – "star witness" Austill was arrested again on a dangerous drug charge. In fact, on December 16, 1968, he was arrested yet again, this time for burglary, and released on $3,000 bail. Also arrested on that occasion was community pillar George Bish, who had fought so hard for justice for his late friend, Ronald Nelson.

You will remember that Mr. Citron first met Nelson when he and a friend left some marijuana and pep pills in Citron's

*Other teenagers have told police officers in the neighborhood that William Clements, of the *Chicago Daily News*, paid Ahrens forty dollars a day to find other prosecution witnesses. I called Mr. Clements and he said it was "absolutely untrue."

washroom. Austill was the friend. He was also one of those arrested on June 11, 1967, for throwing stones at Franksville and sending Officer Nuccio to the hospital. Austill is a specialist at throwing stones. He had thrown them many times at Mr. Citron and his restaurant. He was throwing them again on June 4, 1968. That was why he had been arrested several times for disorderly conduct and, like Nelson, told by Judge Epton to stay away.

So on the night of the shooting, not only was Austill's presence at Franksville,


CHICAGO POLICE DEPARTMENT

Honorable Mention

AWARD

But one of Patrolman Nuccio's 26 citations.

like Nelson's, a violation of a Judge's order – resulting in his arrest for criminal trespass – but he was already on probation for a previous offense.

In fact, on that night this "witness" was already a fugitive, wanted by the police for jumping bond in another case, and a warrant was outstanding for his arrest.

I realize all this is hard to believe. I'm sorry about that. I'm trying to tell it as baldly as possible to avoid making it even harder.

So now, members of the jury, you have an idea of the credibility of the witnesses. But that of course proves nothing about the incident itself. Hopheads, after all, have moments of lucidity. Maybe the witnesses are telling the truth. So let's hold in abeyance what we have just discussed. Let's forget that these are "oppressed teenagers." Let's treat them like the responsible individuals they say they are, and look strictly at their testimony.

There is for instance a gentleman named Stephen P. Austill, the State's star witness. In July, 1967, Nelson was arrested, and Austill says he went to the police station to get him help, offering in exchange to give information on narcotics to Officer Kenneth South:

Q. Did you have such information available to give Officer South at the time you made the offer?

A. No, sir.

Q. Was that, then, a false promise to him?

A. Yes, sir.

Q. You lied to a police officer to help your buddy?

A. Yes, sir.

Q. So are you lying now on the witness stand for your own purposes?

A. No, sir.

He says he lied to the law before, but is telling the truth now. Does that produce in your mind more than a reasonable doubt? Doesn't it establish the State's *star* witness as an admitted liar?

Then there is Mr. Jose Rodriguez, who said he is a student at Wright Junior College, but under cross-examination said he hadn't started yet:

Q. Was Nuccio in an unmarked car?

A. Yes.

Q. Was Nuccio in uniform?

A. Yes.

Q. He was in uniform in an unmarked car?

A. Yes.

* * *

Q. What was the color of Nuccio's unmarked car, again, please?

A. Brown.

Officer Nuccio of course was in a *marked* car that night. But, as your attorney will tell you, there will often be discrepancies in testimony about tangential details even when witnesses are telling the truth, simply because no two people remember everything alike. So let's simply confine ourselves to the issues on which the State based its case.

Here, for instance, is how Mr. Rodriguez handles the crucial question of how far Nuccio was from Nelson:

Q. Did you ever say to anybody at any time that when Nuccio fired the shot he was 50 feet away from Nelson, did you ever say that?

A. Yes, sir.

Q. And that is different from your testimony now, that he was 80 feet. Is that correct?

A. Yes, sir.

Rodriguez does not explain the additional feet. He simply agrees that, yes, they are additional.

Then there is Edward Ryan, who in a deposition said he was five or ten feet from Nuccio when he fired; at the trial said he was fifty or sixty feet away; then that he was twenty feet away:

Q. Tell us again how far you were away from Nuccio when Nuccio fired the shot in terms of feet?

A. About a rough 20 feet behind him.

Q. You were now 20 feet behind him?

A. That's right.

Ryan also says that Nelson was ninety feet from Nuccio when shot. Remember that the distance between them is crucial to the question of whether Nuccio was in any danger:

Q. And when Mr. Tully [a prosecutor] was asking you questions on July 18, 1968, did you tell Mr. Tully that Nelson was about 40 feet and not 70 or 80 from Nuccio when Nuccio fired the shot, did you tell him that?

A. Yes.

He explains that he returned to Franksville two weeks before the trial and found the distance was seventy or eighty feet. He doesn't say whether he had any help in making this convenient determination.

Closely related to the distance between them is the question of whether Nuccio followed Nelson into the alley. Nuccio and Hyatt say he did, at a distance of twenty or twenty-five feet. But the State's witnesses say he didn't and was far behind. For instance, there is a female named Mary Falagario, who says Nuccio was ten feet north of a light pole at the entrance to the alley when he fired:

Q. Do you know how wide the east-west alley is?

A. No.

Q. You know the alley is about eight feet wide?

A. No.

Q. And that if Nuccio was ten feet to the north of the alley pole, he would be north of the alley and couldn't shoot into the east-west alley? Do you know that?

Then there is a female named Jessica Genaro, who says also that Nuccio was north of the pole when he fired.

Q. How far north of the pole?

A. Well, he was about 10 or 15 feet from the pole.

Q. Well, was he 10 or 15 feet north of the pole?
A. Northeast of the pole.
Q. Northeast of the pole?
A. Yes.

Remember that these are the State's own witnesses. And according to Miss Genaro it was even less possible for Nuccio to fire into the alley. She, too, says she attended one of those meetings about the matter.

And there is Miss Edna Rosario:

Q. And he was a little to the north? Or was he to the south of the light pole?
A. No. He was north.
Q. He was north?
A. Yes.
Q. How many feet north of the light pole was he?
A. Around 20.
Q. About 20 feet.
A. Yes.

So according to Miss Rosario, it was *doubly* impossible for Nuccio to fire into the alley. Something is mighty strange here, isn't it?

Then there is the question of whether Nelson had a knife. None of the State's witnesses saw anything, of course, but on June 24, 1968, Mary Falagario signed a statement for the police in which she said, "I can't be sure" Nelson didn't have a knife. At the trial, however, she says she saw nothing in his hands.

Curious.

And there is the question of how Officer Nuccio actually fired. The Officer says he fired from one knee as part of a reflective action to avoid the knife. The State says he took careful aim and fired erect. But State's witness Leonard Noe testifies as follows:

Q. Did you ever say that when you saw Nuccio fire the gun that he went down almost to one knee? Did you ever say that?
A. Yes, I imagine I did.
Q. Well, you know you did, don't you?
A. Yes, I did.

Police officer after police officer, after Ben Citron, said Noe was right; that Nelson had a knife and threw it; that Nuccio had been warned about it; that he fired from only twenty or twenty-five feet. The knife was duly presented in evidence. And as we have seen, defense

Elmer Gertz of Red Guild harasses Nuccio.

attorney Julius Lucius Echeles destroyed the State's case with a thoroughness reminiscent of the Dresden firebombing. But he made one mistake. He waived a jury trial in favor of a bench hearing before Judge Richard J. Fitzgerald. And, incredible as it sounds, Judge Fitzgerald bought the State's case.

He bought it all.

He agreed, for instance, that Nelson was seventy to ninety feet away when Nuccio fired. "And it would be illogical, therefore, to assume that the deceased

could have in any manner caused the officer great bodily harm . . . ."

Let us assume for the moment that Nelson was as far away as anyone has claimed: ninety feet. Are we also to assume that one is in no danger from a knife thrown that far? Would those who say yes be willing to test their answer? Remember that the target of such a knife has no time to pull out a tape measure to satisfy a judge. And observe that Judge Fitzgerald doesn't say he disbelieves that Nelson had a knife – just that at a distance of seventy to ninety feet Nelson couldn't have done enough damage.

On Thursday, August 29, 1968, Judge Fitzgerald found Police Officer Nuccio guilty of murder – only a few hours after hordes of Communists and young toughs and dupes attacked his fellow officers the evening before, a short walk away at the Conrad Hilton. If, like millions of other Americans, Judge Fitzgerald was watching television on the evening of Wednesday, August twenty-eighth, he saw not those Communist attacks, but just the Chicago police responding to the attacks, which created the impression of an unprovoked "police riot," as the *Walker Report* put it. He heard such humanitarians as Walter Cronkite expressing indignation. Like millions of other Americans, he was watching an organized attempt to discredit our local police – organized primarily by the Communist National Lawyers Guild, preeminent in which is the same Elmer Gertz who now appears as the Nelsons' lawyer.

"There is something within the human soul which cries out against sacrificing a 19-year-old on the altar of deterrence," he said in his verdict, a few hours later in court.

He called his decision "the most difficult I have ever had to make." Some weeks later, he sentenced Richard Nuccio to fourteen to fifteen years in prison the minimum sentence. He has permitted Nuccio a convicted murderer to live at home while his appeal is being filed.

Could it be that Judge Fitzgerald's conscience is bothering him?

IV

PARTICULARLY amazing in the matter is the behavior of the Office of the State's Attorney, in particular that of Assistant State's Attorneys Thomas M. Tully and Matthew P. Walsh, who collaborated to prosecute Officer Richard Nuccio. You will remember that on the night of June 4, 1968, *star witness* Stephen Austill was arrested for criminal trespass. The State's Attorney's Office has since tried to avoid prosecuting him, because he was so helpful in the Nuccio case. You will also recall that, soon after the shooting, community pillar George Bish and some others were arrested for sending another police officer to the hospital. The State's Attorney's office apparently wanted to "nolly" that one, too. Indeed, several police officers tell me this is standard operating procedure, and ask with puzzled bitterness whether it pays to make any more arrests.

On the fatal night of June fourth, as you will also remember, Officer Ronald Rothmund saw Nelson, armed with a knife, escaping the scene. You would think, wouldn't you, that Rothmund had vital testimony to give in the case. But Tully and Walsh, trying for an indictment, did not summon him to the Grand Jury to give it:

Q. Were you called by the State's Attorney to testify before the Grand Jury in this case?

A. No, sir, I was not.

Q. Did Mr. Tully, the Assistant State's Attorney here, know your name?

A. Yes, sir, I believe he did. It was on all the records from the inquest and prior to that.

And you will remember that Officer Kenneth Hyatt also saw the knife. It was Hyatt who warned Nuccio that Nelson

was going to throw it. You would think, wouldn't you, that Hyatt also had vital testimony to give. But Tully and Walsh didn't call him either:

Q. On the day that you spoke with Mr. Tully at the scene of the Franksville area, did you tell Tully that you saw a knife on Nelson and saw Nelson throw a knife? Did you tell him that?

A. Yes, sir, I did.

* * *

Q. Were you subpoenaed by anybody to appear before the Grand Jury that returned an indictment in this case?

A. No, sir.

Your attorney will also tell you that the function of a prosecutor in the United States – isn't simply to prosecute. It isn't just to lock people up. For that we wouldn't need an American prosecutor. We would need a Gestapo or a K.G.B. and a theatrical director, who could stage one of those Nazi or Communist show trials. In our country, on the contrary, a prosecutor is supposed to develop *evidence* – even if the evidence frees an accused – because his purpose isn't basically to prosecute, but to *protect the innocent.*

But Tully and Walsh apparently did some staging of their own. They denied the Grand Jury the testimony which would have thrown the case out of court.

Since the charge was murder, which after all requires some premeditation, Walsh told Judge Fitzgerald at the trial that Nuccio "used the gun that he was given as a police officer to carry out a crime that he possibly had planned, he certainly instituted and completed, on the 4th of June, 1968."

But, first, Officer Nuccio of course didn't know he was going to Franksville that night, until he heard the call on his radio a few minutes before his arrival. He didn't know who would be there. He didn't know what he would find. He didn't even see Nelson until he came running around the building a few seconds before the shooting – which is how much time Nuccio had to "premeditate." And, second, if you really are premeditating to murder someone, would you really premeditate to do it before a swarm of your victim's friends? Does that make sense?

And finally there is the fact that on the evening of the morning Mr. Citron testified, Walsh appeared at Franksville, denounced his testimony, and tried to intimidate him – which if not unlawful itself is at least highly unethical – to such an extent that Citron ordered him off the property.

"Do you realize the penalty for perjury in this state?" said Walsh.

And that sounds to me like some sort of "brutality." Wouldn't you agree?

Indeed, only a short time later, Walsh's partner, Assistant State's Attorney Tully, was accused of intimidating another witness, in another case – "I told him that if he told a falsehood in court, under oath, he could be liable for perjury and could be convicted" – but has been exonerated by the Judge for lack of evidence.

The Judge was the same Richard J. Fitzgerald who convicted Nuccio.

By this time, of course, you are asking yourselves why Tully and Walsh would behave so incredibly. You are wondering whether there could be any other reason than a desire to make grisly reputations.

We don't yet know the whole story – we shall – but apparently there could be such a reason.

V

WHEN I went to Chicago to investigate this case for AMERICAN OPINION, I naturally did not know what I would find. Some people were saying Nuccio had been railroaded. But he had been given his trial and convicted. And policemen are human, like everyone else. Like

judges and prosecutors, they sometimes go wrong. So I thought that maybe I would find nothing amiss. Maybe the complainers were simply complainers. Maybe Nuccio deserved what he got. You will remember that the first public meeting which led to Nuccio's conviction was held at the Reverend Carl Lezak's St. Sebastian's School, and that Lezak took an active part. I had heard that Lezak believed Nuccio was guilty, so I called on him to see whether he could persuade me to agree.

The Reverend gave me a very cordial hour. Like the excerpts of revolutionary literature you have read in this article, he explained that the Nuccio case is symptomatic of the growing "polarization" of our society – in other words, that the teenagers and the police, for instance, are at opposite poles. Indeed, Commander Fahey of the Nineteenth Police District will be interested to learn that Father Lezak says he has kids in his school who are thinking of blowing up the police station, and that one of them says he will become a human torch to do it.

Father Lezak said he "feels sorry" for Nuccio – because he is a murderer – but that most people in Lake View take Nuccio's side, which Father Lezak deplores. He also said the country in general supports the Chicago police, which he also deplores. People don't know the facts. For instance, he said, a hippy or even somebody with a long haircut, gets rough police treatment in the neighborhood. And he said he had been at Lincoln Park during the Convention riots to "counsel the youth," and saw horrible "police brutality," which he said the *Walker Report* proves.

I said I was glad to hear he had actually read the *Report*, because I had read it too, so we both knew it contained statement after statement by the revolutionary leaders that they were specifically coming to Chicago to attack the police.

He answered that he had always been for equal rights for all people. He criticized his congregation, many members of which he said pay their buck or so on Sundays but don't like his sermons on bad housing and civil rights. Maybe they didn't tell him at the seminary that people don't go to church to hear about bad housing.

He said he and a Reverend Bruce Young had recently gone to a meeting in Gary, "and got the word: it's coming."

"What's coming?"

"A Rightwing, Fascist takeover."

That's what he said.

He deplored the fact that the country is moving to the Right. He said he himself is a marked man – marked by the police. For instance, he was physically afraid to go to the Nuccio trial – afraid of the police. Indeed, he said, he is on the subversive list of the Chicago police. I asked him why in the world that would be so. He answered that he didn't know, but that he had always been for equal rights for all people. He came out strongly against "simplistic solutions."

"Are you a Communist?" I asked.

"Certainly not!" he said. "Communists are atheists and I'm a Roman Catholic priest."

He was wearing a yellow sport shirt, but I believed him. Since he said he isn't a Communist, I naturally believed that, too.

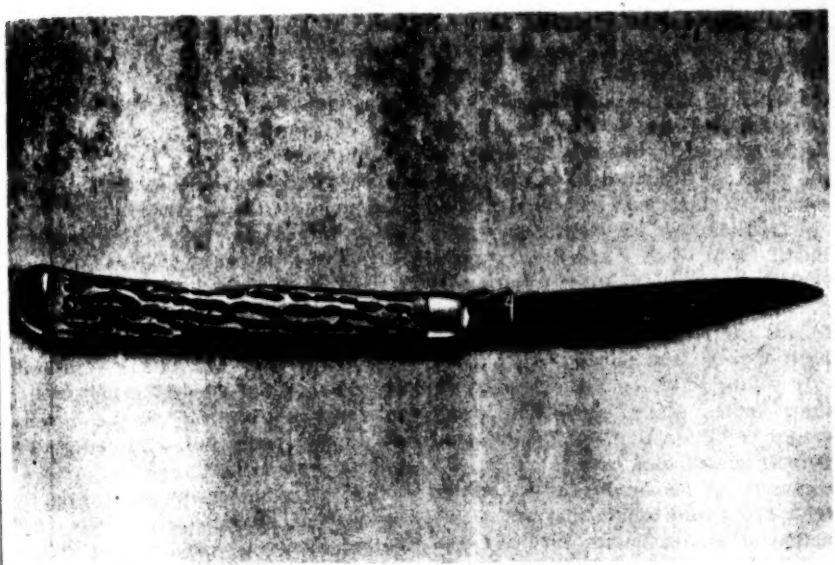
"Are you associated with the Chicago Peace Council?" I asked suddenly.

His eyes narrowed warily, which doesn't prove anything, of course. But, you see, I already knew that one of the reasons he could be on the subversive list is the fact that he has contributed money to the Chicago Peace Council. The C.P.C., as you will recall, is the Communist outfit headed by a Communist and defended by Leninist Elmer Gertz, who now turns up as lawyer for the Nelsons.

"I think I'm on the mailing list," he said.

Interesting, isn't it? Gives you a tingly feeling all over.

I told Father Lezak that, frankly,



Shown here is the knife which hoodlum Ronald Nelson used in attack on Officer Nuccio.

another Roman Catholic priest had told me that children coming home from St. Sebastian's School report that Lezak teaches as follows: "I see nothing wrong with Communism." Indeed: "I sympathize with Communism."

"Another priest told you that?"

"Yes."

"It isn't true."

But, you see, the other priest also told me that one of the victimized parents recently stopped in his office with the announcement that he was on his way to St. Sebastian's to kick Hell out of Lezak, and it was only after much soothing that the other priest was able to change the man's mind and let him out of his office. Had he failed, Lezak would have known how to take it. In February, 1968, he claims to have been beaten in a "civil rights" march at Mt. Greenwood School.

And finally Father Lezak told me – get ready – that as chance would have it, *one of his old friends and schoolmates is a prosecutor in the Nuccio case.*

Why would he tell me this? I don't know. Maybe so that when I found it out, myself, I would be less dumbfounded than you are now. He told me carefully that his friend had snubbed him in the courthouse corridor during the trial, which he said was another example of "polarization" – and which certainly puts both of them in the clear, doesn't it? When he saw I hadn't known about the relationship, he refused to say another thing about it, and would not say which of the prosecutors it is: Tully or Walsh. At this writing, we still don't know, but, as I say, we shall.

Handy, don't you think? Brings all sorts of questions to the mind. Wouldn't you, too, like to have a prosecutor stashed away – just in case you were burning like Hell to have somebody prosecuted?

The second public meeting, which caused Nuccio's conviction, the one at which Commander Fahey was treated like a Nazi, was held as you will recall at the Lake View Presbyterian Church. So I went to see that church's Reverend Thurston Barnett. In the room when I arrived was the Reverend Bruce Young, a

neatly bearded gentleman who like the Sphinx spoke not at all, but studied me through slitted eyes just like in the movies. This was the same man who went with Father Lezak to Gary, where the Father assured me they were warned of the coming "Rightwing, Fascist take-over." He questioned me closely about my credentials – yes, he did say something – and when I expressed surprise, explained along with Barnett that police spies have been nosing among their friends for information, and are in the habit of giving false names.

Then the Reverend Young studied me some more, deftly cataloguing every gesture and intonation, and the Reverend Barnett himself took over. He spoke with contempt of his mother-in-law, one of these types who believe that the assassination of Martin Luther King was conceivably part of a Chinese Communist plot to worsen racial conflict in our country. This made me feel at home. My mother-in-law, also a Presbyterian, also believes that, but I concealed the fact to prevent him from deriding her as well.

He asked me what I thought of the theory. I said I didn't know the facts but it was certainly possible.

When the Reverend Barnett hears something he doesn't like, he snickers. He did so now. Like Father Lezak, he complained about his congregation, many of whom are thinking unpleasantly like our mothers-in-law. He explained that he is for liberty, but a parent has no right to educate his child any way he likes. I asked why it would be better for somebody other than the parent to decide. I said that he and I obviously disagreed, and asked whether it would be all right with him if *I* decided what *his* children should learn.

He snickered and explained that he was for equal rights for all people, and that it was important to avoid "simplistic solutions."

He defended the Reverend John Fry, another Presbyterian minister, who in June of 1968 was accused in a Senate investigation of permitting the Blackstone Rangers, a Chicago gang, to store sniper rifles, sawed-off carbines, hand-grenades, and other weapons – bought with "war on poverty" money – in his First Presbyterian Church. We are told that Fry also permitted the gang to smoke marijuana in the church; advised the members in an extortion racket yielding thousands a week; warned them to watch out for a police raid; and, once passed along a murder assignment. On June 24, 1968, Fry himself told the Senate Permanent Investigating Subcommittee that he had used money from the Chicago Presbytery to provide bond and legal counsel for indicted gang members.

But everything we have read in the newspapers about Fry is false, said Barnett. Indeed, he said, it was Fry who solved the problem of the weapons. The trouble we have been reading about was caused by the corrupt Chicago police. Fry's "solution" was to arrange a treaty between the police, federal authorities, and the gang – under which Fry locked the weapons in a vault in the church – and the corrupt Chicago police raided the church in violation of the treaty, said Barnett.

He didn't say why a gang which specializes in extortion and murder should be given the same status as the Chicago police, and dealt with by treaty like a foreign nation; and he didn't say why storing hand-grenades in a church vault is a *solution.* The good Reverend wouldn't admit actually knowing Reverend Fry, "but you hear things around the Presbytery."

Like Father Lezak, the Reverend Barnett saw the violence at the Democrat Convention and: "It took all I had, physically, to keep from throwing rocks at the police, myself."

I know you're sorry he said it. So am I. But those were the Reverend Barnett's exact words. And like Father Lezak, he recommended the *Walker Report.*

I said I was glad to hear he had actually read the *Report*, because I had read it too, so we both knew it contained statement after statement by the revolutionary leaders that they were specifically coming to Chicago to attack the police.

He snickered and said he was for equal rights for all people. He warned about those dangerous "simplistic solutions."

The Reverend Bruce Young had by now been gone long enough to do some research, and the telephone rang. When he hung up, the Reverend Barnett asked whether I didn't think the greatest danger to the country wasn't Communism, but such groups as The John Birch Society. He described in detail the seizure of Germany by Hitler and his Nazis; like Father Lezak, he was against them. And he talked at length against "the system" – ours. He said the problem isn't just that rotten individuals in it get authority, but that the system itself makes them rotten; which is why, he explained, the same corrupt situation will prevail when Commander Fahey of the Nineteenth Police Division is replaced. He said we should "reorganize" the police department – indeed, the country. I asked repeatedly what he meant; except for the Communist solution of a civilian review board, which the Human Relations Committee of L.V.C.C. endorses, he would not exactly say.

But a "simplistic" answer was flickering in my mind.

Indeed, after a while, we got into the Nuccio case. And I told the Reverend Barnett that what bothered me was for instance the fact that Nuccio has a record of twenty-six Honorable Mentions, while Nelson had a record of several arrests, and according to the autopsy was an acute alcoholic.

That only proves the corruption of the system, said Barnett. It gave twenty-six Honorable Mentions to a murderer. I asked the good Reverend whether he meant that a man is guilty of a crime even before he commits it, and Barnett came out strongly for equal rights for all people. As for the autopsy, he said he believes the pathologist is lying. I asked him why and he explained that "Chicago is corrupt."

Unsuccessfully suppressing a smile, I reminded him that I was a professional journalist; said that I was covering a story, whatever the story was; that if the autopsy is a lie, I would definitely say so; that as a New Yorker, I was delighted to believe Chicago is corrupt – that, in fact, I do believe it; but that we would both look very stupid if I wrote that the pathologist is a liar because Barnett dislikes Chicago. I asked whether there is any *evidence* to support his charge.

He said there isn't – but that he believes it anyway.

I'm sorry all this is so remarkably amusing. But it is an exact narration of our conversation.

I asked the Reverend Barnett whether he saw any contradiction between his ridicule of the idea that the Communists killed King, which the evidence about the Communists makes believable; and his acceptance of the idea that the pathologist is conspiring, for which no evidence exists – and he sternly warned against "simplistic solutions."

What would you guess his reaction would be if I wrote here now that Barnett is a Communist, and that I have no evidence – except for his hatred of the police and our system, for instance – but we know for a fact that some other ministers are?

And finally there was the question of the knife. And I pointed out that it wasn't just something Officer Nuccio says was discovered, but that his testimony is corroborated by three other police officers and a businessman – who were on the scene and saw it.

Barnett snickered and said Mr. Citron is lying. He said he couldn't have seen Nelson playing with a knife, because the Franksville table he was sitting at can't be seen through the window. If this is true, I

said thunderstruck, the defense is shaken, if not shattered.

"How do you know that?" I asked. "Have you looked for yourself?"

"Yes," said the Reverend Thurston Barnett.

Here at last was something I could check. So the next afternoon after seeing Father Lezak, I did so. I went behind the counter at Franksville, stood in Mr. Citron's footprints, and looked through the window.

I saw perfectly.

I saw everything: the table, the street, and Wrigley Field.

Indeed, if Barnett really did bother to look, he was even four or five feet closer the width of the counter and the intervening space — his Presbyterian nostrils pressed to the glass; because Citron says Barnett has never been behind the counter.

"Only one other man has done what you just did," said Citron.

"Who?" I asked.

"Tully," he said.

"What did he say?" I asked.

"Nothing."

So when I looked through that window, I knew Barnett is lying. That is somewhat "simplistic," I realize – but it is the truth.

And I knew for sure that Officer Nuccio is innocent.

VI

So you see, what ran over Richard Nuccio is the Communist War On Police. Indeed, Chicago Police Intelligence has already established that what you have read here is just the proverbial scratch on the surface. And the purpose of the Communist War on Police, as always, is to demoralize, discredit, and destroy our independent, local police, so that Communists can impose their totalitarian dictatorship. One major part of the plan is the rioting run by Communists in the streets – which their allies in government forbid the police to suppress – to create the impression that our local police are inadequate in training, manners, and capability. The other major part is the current attempt by conspirators in government to seize our local police – with the usual weapon of federal "aid" coupled with federal "guidelines" (that is, *controls*) inflicted by the new federal "anti-crime" law – allegedly to satisfy demands for "law and order."

The result, if successful, would be the same national police force, the same *gestapo*, Barnett and Lezak claim to be against. And it would produce the "law and order" of a totalitarian dictatorship – of a Nazi Germany – which they also claim to be against. Indeed, a national police force is a hallmark of a totalitarian dictatorship, isn't it? There couldn't be, and has never been, a dictatorship without one. Every totalitarian dictatorship needs a national police force just to keep itself in power – because it *is* a dictatorship. It makes no difference, to the victims, what color uniforms the dictators wear, what sort of concentration camps they run, or whether they call themselves Communists or Nazis – no difference at all.

So just because somebody claims to be against the Nazis doesn't mean he really is. In Communist fashion, he may simply be keeping alive the dead idea of Nazism with which to smear anyone who opposes Communism. No, the deciding factor is whether he supports or opposes what makes a Nazi Germany – and all other dictatorships – possible: concentration of power; totalitarian power. The crucial question is whether he supports or opposes the local, independent police forces which have kept America free.

The question arises: Why, then, are the Communists always calling for "local control" of our police? And the answer is that this is a typical demonstration of the Communist principle of reversal. We *already have* local control. We're trying to keep it. If enough citizens of Chicago, for instance, are dissatisfied with their police,

they can elect a different Mayor, with a mandate to appoint a Commissioner they prefer. The Communists, on the contrary, are trying to *discredit* local control – by associating it in your mind with the Communist terrorists demanding it for their agitators. As always, they are trying with perfect consistency to arrange by boomerang the *gestapo* they claim to be against.

And that is why, in this case, they chose so fine an officer as Richard Nuccio as the victim. Almost everyone wants a bad policeman punished; civilians do, and the police themselves do. A bad policeman does damage to his department. Punishing him protects the department and good, local law enforcement. But to punish a good policeman – the best, a man with twenty-six Honorable Mentions – in the name of "local control," and "good police-community relations," is to attack the system of which he is a part; to attack the local control one claims to endorse. And Nuccio just happened to get the short end of the nightstick.

What are you going to do about it?

Mayor Richard J. Daley has refused to see Mrs. Nuccio, but he had time the other day to see Hubert Humphrey, who calls himself the "biggest victim" of the Convention. Two Chicago Assistant Corporation Counsels warned Nuccio not to testify at the coroner's inquest, for fear what he said might jeopardize their defense against Communist-fronter Gertz. Nuccio obeyed and was charged with violation of Rule Number Fifty-One: refusing to testify at a coroner's inquest. Of course, the City did offer him one dollar – one – if he would sign an affidavit promising to "release and waive any and all claims for salary, rights of action or causes of action which I have or may have against the City of Chicago, arising out of any thing done or left undone from the beginning of the world down to the signing of these presents . . . ." He refused.

And Frank Sullivan, director of public relations for the Police Department, told me in his office that as far as the Department is concerned the case is closed, "because the jury found Nuccio guilty." Sullivan publishes a magazine for and about Chicago policemen – but he doesn't even know that the first Chicago policeman to be found guilty of murder in fifteen years was convicted not by a jury but a judge.

So you see, it's up to you, as always – as it should be.

What are you going to do?

You don't have to do a thing, of course – not even one. It's still a free country, if you will pardon the expression. But you see, the Nuccio case is doing what it was designed to do: demoralizing and embittering his fellow officers. If you don't, there may come a time – it is no longer an "extreme" joke to say this – when you will want a policeman, desperately, and no one will show up. And if you survive, you may soon find yourself living under a totalitarian dictatorship which would make the reign of Caligula seem like the Jefferson Administration.

So if you do nothing now, how long do you plan to wait?

Indeed, how long do Nuccio's fellow officers plan to wait? There are those trying to spread the word around the Department that Richard Nuccio is a wrong cop. But you have read the truth here. Where is he wrong? And by the way, police officers of Chicago, have you wondered where that raise you are now enjoying comes from? From the federal government, doesn't it? – which makes you federal employees – because he who pays the piper has the right to call the tune. Are you willing to be turned gradually into part of a national police force – with all that means? And if you aren't, the question is still how long you plan to wait. How much closer does it have to come? To the point at which you, too, are boobytrapped like Nuccio?

Richard Nuccio is twenty-seven years old. His ambition was always to become a

policeman. For seven years, before he succeeded in December, 1966, he was a clerk and mailman for the U.S. Post Office. Today he lives with his wife and three small children in a $100-a-month apartment, in a building you enter from an alley. So he isn't exactly an Imperialist Exploiter. He lives in the area he patrolled. Apparently he had about the same breaks as the hoodlum Nelson. Indeed, first-class attorneys like Nuccio's do not come for free. His case has already cost him about $10,000, collected in donations from fellow officers and in loans from friends and relatives; and his appeal, now being filed, will cost him $5,000 more. I suppose he could have gone on Welfare, but since his suspension he has been working at construction and minor mechanical work.

His wife is not the career girl type. Apparently she spends most of her time in the kitchen plotting to ruin Nuccio's figure. She will have a hard life if you let her husband do time. And the sentence, remember, is fourteen to fifteen years. Indeed, the other inmates of a prison always brutalize a convicted policeman – especially today. So suppose that Nuccio is seriously injured or even that he doesn't come out alive. Some of you responsible, mature, industrious, and humane teenagers who saw no knife at Franksville that night may not yet have thought of that. It may not have occurred to some of you who saw what happened that night but haven't testified. And of course if it happens there will be no going back. Years later, some of you may wish to, but there will be no going back. So maybe Nelson was the wrong guy the facts say he was, after all. Indeed, I would bet that if you think about it hard enough, somebody will remember that knife – which would prove you are the adult you claim to be.

In fact, maybe this hasn't occurred to you either, but the elderly schemers over twenty-five who got you into all of this have been playing you for suckers – just as they did the teenagers in Cuba, China, Russia, and Czecho-Slovakia, before they grabbed those countries and wiped out all rights.

As we have seen, it was publicity and organization that led to Richard Nuccio's conviction. And it is only publicity and organization that can lead to his release. Now is the time for you, the people, united, to speak. And you might begin by demanding answers to some interesting questions:

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Why is the Reverend Barnett lying?

One thing already stands out clearly: Richard Nuccio is innocent. *He must be freed* ■ ■

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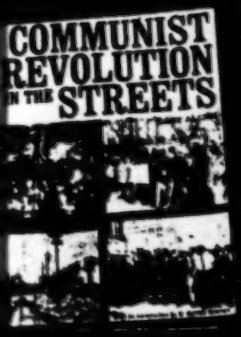

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We are rather proud of our magazine, and not at all surprised at its sizeable international circulation—with subscribers ranging from princes and cabinet ministers to sheep ranchers in Australia and cab drivers in New York. After all, while ours is a thoroughly "Conservative" magazine, it is also thoroughly exciting. We broke the first national story on the Black Muslims and predicted the Black Power movement long before it developed. We exposed Communist influence in the California grape strikes, in Martin Luther King's S.C.L.C. and in the Castroite Tijerina Movement of the American Southwest—naming names and citing detailed proofs. We established Fidel Castro's Communist background long before he was brought to power. As early as 1962 we predicted the Franco-American split and noted that Charles de Gaulle had made his deal with the Soviets. We documented Communist infiltration of the "War on Poverty"—again, and as always with us, naming the names and citing the detailed proofs. We covered the holocausts in Watts, Detroit, Newark, Washington, Cleveland, and other cities directly from the scene—telling what others refused to tell about Communist participation. We detailed the Communist manipulation of such Fronts of the Far Left as S.N.C.C., the S.D.S., R.A.M., and a number of others, more than a year before they began to make headlines. We have even dared to publish the names of American firms trading with the arsenal of the Vietcong. And, we . . .

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Dear Reader:

As we go to press we have been reliably informed that after reading Alan Stang's exposé of the activities of his revolutionary terrorists in New Mexico, which appeared in last month's *American Opinion*, Castroite generalissimo Reies Tijerina vowed to his Marxist Comrades that if Stang ever again sets foot in the State – *Reies would send someone to kill him!* Whether the threat was mere braggadocio, or whether Tijerina meant it, we do not know. But we do know that when *American Opinion's* Alan Stang goes after the facts in a story he gets them – just as he has, again, in the very important article beginning on page one.

Mr. Stang reports this month on the framing for murder of an outstanding Chicago police officer – a man with no less than twenty-six formal citations for the excellence of his police work. That this is a part of the Communist war on our police is as certain as the innocence of this officer they have chosen as their symbolic target. So important is this one, in fact, that reprints will be made immediately available.

And, while we are emphasizing importance, we want to call your special attention to Gary Allen's article here on the Council of Foreign Relations – whose conspiratorial antecedents he authenticates in what is clearly a research breakthrough of simply monumental importance.

Whether you turn first to Alan Stang or Gary Allen – or Taylor Caldwell or Medford Evans or E. Merrill Root – we think you will agree with us that this is one issue of *American Opinion* you won't be lending to even the most trustworthy friend. If he *is* a friend, you'll want to urge him to buy a copy for himself.

Sincerely,

Scott Stanley Jr.

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[The remainder of Exhibit "B" is identical to the article attached to the Complaint as Exhibit "A," except the last page, which follows:]

policeman. For seven years, before he succeeded in December, 1966, he was a clerk and mailman for the U.S. Post Office. Today he lives with his wife and three small children in a $100-a-month apartment, in a building you enter from an alley. So he isn't exactly an Imperialist Exploiter. He lives in the area he patrolled. Apparently he had about the same breaks as the hoodlum Nelson. Indeed, first-class attorneys like Nuccio's do not come for free. His case has already cost him about $10,000, collected in donations from fellow officers and in loans from friends and relatives; and his appeal, now being filed, will cost him $5,000 more. I suppose he could have gone on Welfare, but since his suspension he has been working at construction and minor mechanical work.

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One thing already stands out clearly: Richard Nuccio is innocent. *He must be freed* ◘ ◘

Immediate Reprints

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[39] MOTION TO DISMISS

The Defendant moves the Court as follows:

1. To dismiss the action because the Complaint fails to state a claim upon which relief can be granted;

2. To dismiss the action on the ground that the Court lacks jurisdiction because the amount actually in controversy is less than Ten Thousand Dollars exclusive of interest and costs.

/s/ James A. Boyle, Jr.
Attorney for Defendant

[41-45] MEMORANDUM OPINION
Filed November 18, 1969

Plaintiff, a practicing attorney, brings this diversity action for libel under Illinois law, claiming that defendant published a magazine article, and reprints thereof, designating plaintiff as a Communist or Communist sympathizer. Defendant has moved to dismiss the complaint for failure to state a claim upon which relief can be granted, or alternatively, for failure to satisfy the requisite jurisdictional amount.

Plaintiff's complaint alleges that he has been injured in his professional reputation and practice by defendant's publications. The alleged defamatory statements include representations that plaintiff has been an "official of the Marxist League for Industrial Democracy, originally known as the Intercollegiate Socialist Society, which has advocated the violent seizure of our government," that he is "preeminent" in the "Communist National Lawyers Guild," and that he is a "Leninist" and a "Communist-fronter."

The complaint generally seeks actual damages of $10,001 and punitive damages of $500,000 in each of two counts. If the libel is only a libel "per quod" rather than a libel "per se," the complaint would be defective because it fails to allege special damages which are essential to the maintenance of a per quod action. See, *e.g., Whitby* v. *Associates Discount Corp.,* 59 Ill.App.2d 337 (3d Dist. 1965); *Continental Nut Company* v. *Robert L. Berner Company,* 393 F.2d 283 (7th Cir. 1968). The defendant contends that calling the plaintiff a Communist amounts only to a libel per quod.

Prior cases have uniformly held that it is libel per se under Illinois law to falsely label one a Communist. *Dilling* v. *Illinois Publishing and Printing Company,* 340 Ill.App. 303 (1st Dist. 1950); *Spanel* v. *Pegler,* 160 F.2d 619 (7th Cir. 1947); *cf. Ogren* v. *Rockford Star Printing Company,* 288 Ill. 405 (1919). Recent Illinois Appellate Court cases in two districts have, however, equated the standards for libel per se with those for slander per se.[1] Assuming that the resultant narrowing of the libel per se category is now the law of Illinois, plaintiff's complaint nonetheless establishes a per se case of defamation, for it meets the requirement that the challenged statements "prejudic[e] a particular party in his profession or trade." *Whitby* v. *Associates Discount Corp., supra,* at 340.

The publication which is here in dispute concerns plaintiff's participation as counsel in certain law suits, and therefore reflects primarily and directly upon his

---

[1] *Whitby* v. *Associates Discount Corp., supra*; *Mitchell* v. *Peoria Journal-Star, Inc.,* 76 Ill.App.2d 154, 158 (3d Dist. 1966); *Grabavoy* v. *Wilson,* 87 Ill.App.2d 193, 202 (3d Dist. 1967); *Coursey* v. *Greater Niles Township Publishing Corp.,* 82 Ill.App.2d 76, 81 (1st Dist. 1967), *aff'd.* 40 Ill.2d 257, 261 (1968); *Reed* v. *Albanese,* 78 Ill.App.2d 53, 58 (1st Dist. 1966).

profession and practice of law. As an attorney, plaintiff is an officer of the court and has sworn to uphold the Constitution and laws of the United States. Communist doctrine, teaching among other things the propriety of violent overthrow of American government, is of necessity inconsistent with this oath and with the attorney's calling. An allegation of Communist affiliations must necessarily cast grave doubts upon an individual's qualification to uphold, apply and interpret our system of laws, a system opposed by Communist theory. *Cf. Grant* v. *Reader's Digest Ass'n.,* 151 F.2d 733 (2d Cir. 1945). The instant charges "impute to him a want of the requisite qualifications to practice law . . ." and are therefore actionable per se. *Colmar* v. *Greater Niles Township Publishing Corp.,* 13 Ill.App.2d 267, 270 (1st Dist. 1957).

Defendant relies primarily on *Ward* v. *Forest Preserve District,* 13 Ill.App.2d 257 (2d Dist. 1957), holding that calling one a Communist is not slander per se. Although that opinion stated that the alleged defamation did not injure plaintiff in his profession, it nowhere identified what that profession was and is therefore not dispositive of the instant case. More analogous is *Remington* v. *Bentley,* 88 F.Supp. 166, 171 (S.D.N.Y. 1949), holding that a charge of Communism injured plaintiff in his profession as an economist. "It is natural to presume that an economist who is a Communist adheres to the economic theories of Communism, which are repugnant to the theories historically accepted in this Country." And see *Maric* v. *Vukotish,* 178 F.Supp. 727 (N.D.Ill. 1959), holding that labeling a person a Communist is slander per se.

Because plaintiff's complaint sufficiently avers a libel per se, actual and punitive damages may be recovered without pleading special damages. Accordingly, defendant's

challenge to the jurisdictional amount must fail. See, *e.g.*, *Lorillard* v. *Field Enterprises*, 65 Ill.App.2d 65 (1965).

For the reasons heretofore assigned, an order has been entered today denying the motion to dismiss.

Enter: /s/ Bernard M. Decker
United States District Judge.

[61-64] ANSWER

Now comes the defendant, by its attorney, James A. Boyle, Jr., and answers the complaint herein as follows:

1. The allegations of Paragraph 1 are admitted.

2. The jurisdictional averment of Paragraph 2 is admitted.

3. Defendant makes no answer to Paragraph 3 of the complaint, except to admit that plaintiff is a public figure as contended therein.

4. Defendant has no specific knowledge of the averments of Paragraph 4 of the complaint, but has no reason to doubt the truthfulness thereof.

5. The allegations of Paragraph 5 of the complaint are denied.

6, 7, 8, 9 & 10. Defendant admits the allegations of Paragraphs 6, 7, 8, 9 and 10 of the complaint.

11. Defendant denies the allegations of Paragraph 11.

12. The allegations of Paragraph 12 are denied and, further answering the said paragraph, the defendant makes no response to the plaintiff's defense of the National Lawyers League because of the irrelevancies of plaintiff's comments in that regard.

13. The entire of Paragraph 13 is denied, except that defendant admits that it did not make such inquiries of

plaintiff or of his family. Defendant contends that the phrase "his associates" is a characterization of relationships peculiarly within the knowledge of the plaintiff, and therefore too vague to require a response.

14. In answering Paragraph 14 of the complaint, the defendant states that it denies the plaintiff's conclusions contained in his digest of defendant's published article. Further, the defendant denies that it should be required to answer the matters raised in that paragraph as plaintiff admits that these matters are not relevant to the issues herein.

15. The defendant admits the pendency of the various court actions as of the time of the filing of the complaint herein, but denies the remaining allegations of Paragraph 15.

16. Defendant denies the entire of Paragraph 16 and denies that plaintiff is entitled to judgment in any sum.

Answer To Count II Of The Complaint

1-5. Defendant adopts and re-alleges its answers to Paragraphs 1 through 5 of Count I of the complaint as and for its answers to Paragraphs 1 through 5 of Count II of the Complaint.

6 & 7. Paragraphs 6 and 7 are admitted.

8 & 9. Defendant admits Paragraphs 8 and 9 of Count II.

10-15. Defendant adopts and re-alleges its answers to Paragraphs 11 through 16 of Count I as and for its answers to Paragraphs 10 through 15 of Count II of the complaint.

For a further and separate defense the defendant alleges:

1. The publication in which the controverted articles were printed is a national magazine widely sold in the United States and in other countries. Its editorial policy is to promote the cause of political conservatism and constitutional democracy. It implements this policy by exposing to public view the activities and philosophies of all persons and organizations which are either Communist or which tend to achieve the objectives of Communism. It views the Communist movement as a present-day threat to traditional American institutions and as a matter of grave public interest and concern.

2. Pursuant to its policy aforesaid, it published the articles in the belief that it is the aim of the Communist conspiracy to undermine the processes of law enforcement by doing anything to discredit, humiliate and harass police authority at all levels. Further, it believed that Officer Nuccio did not receive a fair trial.

3. The defendant denies that the words used in the said article, as they related to plaintiff, in their natural and ordinary meaning, impute to the plaintiff any want of ability or integrity as a lawyer, but portray him as one who associates with Communists and whose activities in the Nuccio matter further the plan of discrediting the police, thus advancing the cause of Communism.

4. Insofar as the allegedly defamatory words were true in the confines of the context intended, and the opinions were fair comments all made in good faith and without malice and that the matters of a Communist conspiracy, and the Nuccio trial itself, were and are matters of public interest for the public benefit they are therefore privileged.

5. The plaintiff admits, in his complaint, that he does not qualify as a person of such quiet anonymity, so as

to fall beyond the scope of the privilege pleaded in this separate defense. He has for years written and published articles of opinion in matters of public interest, lectured extensively in these areas and has appeared innumerable times on radio and television, locally and nationally, as panelist or guest speaker in many areas of public interest and concern. Further, he is currently so engaged. In addition to the foregoing, he is a public official in his capacity as delegate to, and chairman of the Bill of Rights Committee of the Illinois Constitutional Convention and was, at the time of the publication of the alleged defamatory articles, an intended candidate for that public office. The defendant concludes that the plaintiff was, at the time of the publication of the article both a "public official" and a "public figure" within the scope of the privilege asserted in this defense.

Wherefore, defendant prays for judgment and its costs.

/s/ James A. Boyle, Jr.
Attorney for Defendant

[150-155] AMENDED ANSWER

Now comes the defendant, by its attorney, James A. Boyle, Jr., and answers the complaint herein as follows:

1. The allegations of Paragraph 1 are admitted.

2. The jurisdictional averment of Paragraph 2 is admitted.

3. Defendant makes no answer to Paragraph 3 of the complaint, except to admit that plaintiff is a public figure as contended therein.

4. Defendant has no specific knowledge of the averments of Paragraph 4 of the complaint, but has no reason to doubt the truthfulness thereof.

5. The allegations of Paragraph 5 of the complaint are denied.

6. The defendant admits that, on March 18, 1969 it mailed the first copies of the pamphlet referred to in Paragraph 6 of the complaint, but denies that it distributed the same "to the public at large". Rather, that was the first order for reprints of the article referred to as Exhibit "A".

7. The allegations of Paragraph 7 are denied. Further answering the said Paragraph, defendant states that the April, 1969 issue of American Opinion was mailed from its office in Massachusetts from March 3, 1969 through March 7, 1969 and that the reprints of the article in American Opinion came by way of orders requested by readers of American Opinion magazine after its publication.

8. Defendant admits the allegations of Paragraphs 8, 9 and 10.

11. Defendant denies the allegations of Paragraph 11.

12. In answer to Paragraph 12, the defendant states that it has no knowledge concerning Mr. Gertz's membership in the Marxist League for Industrial Democracy, the League for Industrial Democracy or the Intercollegiate Socialist Society. Further answering the said Paragraph, defendant states that plaintiff was an officer of the National Lawyers Guild during the earliest years of its formation, during which said time the National Lawyers Guild was cited by the House Unamerican Affairs Committee, of the Congress of the United States, as a "communist front organization". Further answering the said Paragraph, the defendant neither admits nor denies that the conventions of the said National Lawyers Guild were attended and addressed by people of "great stature and

reputation", but contends that such matters are not relevant to the issues in this case.

13. The entire of Paragraph 13 is denied, except that defendant admits that it did not make such inquiries of plaintiff or of his family. Defendant contends that the phrase "his associates" is a characterization of relationships peculiarly within the knowledge of the plaintiff, and therefore too vague to require a response.

14. In answering Paragraph 14 of the complaint, the defendant states that it denies the plaintiff's conclusions contained in his digest of defendant's published article. Further, the defendant denies that it should be required to answer the matters raised in that paragraph, as plaintiff admits that these matters are not relevant to the issues herein.

15. The defendant admits the pendency of the various court actions as of the time of the filing of the complaint herein, but denies the remaining allegations of Paragraph 15.

16. Defendant denies the entire of Paragraph 16 and denies that plaintiff is entitled to judgment in any sum.

Amended Answer To Count II Of The Complaint

1-5. Defendant adopts and re-alleges its answers to Paragraphs 1 through 5 of Count I of the Complaint as and for its answers to Paragraphs 1 through 5 of Count II of the complaint.

6-9. Paragraphs 6 through 9 of Count II of the complaint are admitted.

10-15. Defendant adopts and re-alleges its answers to Paragraphs 11 through 16 of Count I as and for its answers to Paragraphs 10 through 15 of Count II of the complaint.

First Separate Defense

1. The publication in which the controverted articles were printed (and this defense relates to the reprint of the said article) is a national magazine widely sold in the United States and in other countries. Its editorial policy is to promote the cause of political conservatism and a form of government known as a "Republic". It implements this policy by exposing to public view the activities and philosophies of all persons and organizations which are either Communist or which tend to achieve the objectives of Communism. It views the Communist movement as a present-day threat to traditional American institutions and as a matter of grave public interest and concern.

2. Pursuant to its policy aforesaid, it published the articles in the belief that it is the aim of the Communist conspiracy to undermine the processes of law enforcement by doing anything to discredit, humiliate and harass police authority at all levels. Further, it believed that Officer Nuccio did not receive a fair trial.

3. At the time of the publication of the article, and for many years prior thereto, the plaintiff was a "public figure" by virtue of being the author of books, newspaper columns, pamphlets, all of which covered wide areas of public interest and which were published all over the United States. Further, during his lifetime, and continuing through the period of publication of this article, and continuing at the present time, he has lectured in public and private forum, appeared in the State of Illinois and nationally on radio and television, innumerable times, as panelist or guest speaker.

4. At the time of the publication of this article, and for a long time prior thereto, plaintiff was a public official in his role as member of, or counsel to, public and

quasi-public commissions and was an intended candidate for delegate to the Illinois Constitutional Convention.

5. Preliminary to the Nuccio criminal trial, Mr. Gertz attended the inquest on the body of a person named Nelson in his capacity as counsel for the family of the decedent, Nelson. During the course of that said inquest he questioned witnesses and otherwise actively engaged in the inquest. As a result of the inquest, Officer Nuccio was bound over to the Grand Jury and, subsequently, indicted.

6. The trial of Officer Nuccio was widely publicized in the City of Chicago and was a public issue.

7. For many years prior to the date of the publication of the controverted article, there was a nation-wide public issue in the United States in which this defendant, and many other persons and corporations, participated, and in which the Government of the United States was actively involved concerning the contention and belief that the Communist conspiracy in the United States actively sought to undermine the processes of law enforcement by doing anything to discredit, humiliate and harass police authority at all levels. The article was published by the defendant in the belief that the Nuccio trial was gravely affected by the conspiracy aforesaid and that the participants in the trial, and the matters preliminary to trial, were either conspirators or were—innocently or otherwise—accomplishing the purposes of the said conspirators.

8. Prior to the publication of the controverted article, and at the time of the promulgation thereof, this defendant had no knowledge concerning the plaintiff other than the article itself. In publishing the article it relied solely upon the reputation of the free-lance writer, Mr. Stang, for accuracy. The defendant was in possession of Mr.

Stang's article for a brief time, checking it only for mechanical accuracy and style and to supply photographs and captions. At the time of the publication of the article the defendant had no knowledge that there would be any challenge to the truthfulness of the article as written, and no reason to believe that it was not true.

9. The matters complained of as libelous in the complaint were privileged under the guarantees of the First and Fourteenth Amendments to the Constitution of the United States in that they constituted fair comment and were made without actual malice.

Second Separate Defense

The defendant denies that the words used in the said article, as they related to plaintiff, in the natural and ordinary meaning, impute to the plaintiff any want of ability or integrity as a lawyer, but portray him as one who associates with Communists and whose activities in the Nuccio matter furthered the plan of discrediting the police, thus advancing the cause of Communism. Thus, the allegedly defamatory words were true in the confines of the context intended.

Wherefore, defendant prays for judgment and its costs.

/s/ James A. Boyle, Jr.
Attorney for Defendant

ORDER

On Motion Pltff, order Par. 3 of amended answer as to Par. 3 of Ct. I and Par. 3 of Ct. II of complaint hereby stricken.

Par. 1 & 2 of First Separate Defense of said amended Answer are stricken.

Motion to Strike Par. 7 of First Separate Defense of said amended answer is denied.

Second Separate Defense of said amended Answer is stricken. (Draft) Decker, J.

[97-100] MOTION FOR SUMMARY JUDGMENT

Now comes the defendant by James A. Boyle, Jr., its attorney, and pursuant to Rule 56 of the Federal Rules of Civil Procedure moves the Court to enter summary judgment for the defendant and as grounds and reasons shows as follows:

1. That in both its original and amended answer defendant has raised as a separate and complete defense:

(a) Plaintiff is a "public figure" or "public official" or both.

(b) That the subject matter of the article complained of related to "public issues" i.e., the nationwide controversy concerning the conduct of the police authority at all levels and the processes of law enforcement and, in addition, the widely publicized murder trial of Police Officer Nuccio in Illinois.

(c) That the alleged libelous matter was constitutionally privileged as "fair comment made without actual malice."

2. That there is no genuine issue as to any material fact with reference to the matters raised in the said separate defenses as more particularly appears from the documents attached hereto and made a part hereof.

3. That plaintiff's judicial admissions contained in the pleadings, the earlier proceedings before the Court, in the course of his deposition and other facts concerning which the Court may take judicial notice, make the conclusion indisputable that plaintiff is a public figure and a public official.

(a) Paragraph 3 of the Complaint alleges in part,

> "He belongs to the American, Illinois State, Federal, Seventh Circuit and Chicago Bar Associations, Appellate Lawyers Association of Illinois, and the Decalogue Society of Lawyers, and has served on the committees of these groups and has been president of the latter organization. He has received awards and citations for public services from several groups. He has written books, pamphlets, articles and reviews, some of his work appearing in leading newspapers, magazines and encyclopedias. Biographical notices of him appear in several standard reference works, including *Who's Who in America, Who's Who in the Midwest,* and *Contemporary Authors,* all of which are readily available to the public as a whole, including defendant."

(b) Defendant attaches hereto as Exhibit 1 and makes a part hereof plaintiff's motion of April 30, 1970 seeking a protective order limiting the scope of plaintiff's deposition.

(c) Defendant attaches hereto as Group Exhibit 2 Pages 3 through 11 of plaintiff's deposition and a memorandum prepared by plaintiff incorporated as an exhibit during the deposition.

(d) Defendant attaches hereto as Group Exhibit 3 Pages 19, 20, 24, 26, 28, 31, 34, 35, 36 and 39 of deposition.

(e) That plaintiff's status as a public figure is further defined and amplified throughout the course of his deposition, the original of which was heretofore filed herein.

(f) That plaintiff was an elected delegate to the Illinois Constitutional Convention and served as Chairman of its Bill of Rights Committee. Pages 27 through 34 of plaintiff's deposition further reflect his status as a public official. Copies are attached hereto as Group Exhibit 4.

4. Plaintiff concedes at Pages 48 and 49 of his deposition that a public issue existed as to the controversy concerning police and law enforcement methods and procedures. Plaintiff further concedes in Paragraphs 14 and 15 of his Complaint that a Policeman named Nuccio was being tried for murder in the Courts of Illinois. The Affidavit of Scott Stanley, Jr. attached hereto and made a part hereof reflects the front page publicity in Chicago during said trial and the existence of the nationwide public issue concerning metropolitan police forces.

5. That as more particularly appears in the Affidavit of Scott Stanley, Jr., the Managing Editor of *American Opinion,* attached hereto and made a part hereof, no issue of fact exists as to the question of malice. Further, that the said Scott Stanley, Jr., as the Managing Editor of *American Opinion,* and as the person who had the ultimate responsibility for the publication of the article in issue, published the said article in reliance upon the reputation of the independent, free-lance author of the said article, Allen Stang, on the prior experience of defendant with the accuracy and authenticity of earlier articles written by the said Stang and published by *American Opinion.*

/s/ James A. Boyle, Jr.
Attorney for Defendant

[156-158] MEMORANDUM OPINION
Filed September 16, 1970

Cross motions for summary judgment have been filed in this libel action.

The libel alleged is contained in an article published in defendant's magazine, American Opinion, dealing with the murder trial of a Chicago policeman. The article referred to plaintiff, an attorney, as a "Leninist" and a "Communist-fronter" and contained additional allegations in a similar vein. Defendant's theory in support of its motion is that plaintiff is a "public official" or "public figure", that defendant was not motivated by actual malice when it published the disputed article, and that any defamatory matter contained therein is therefore privileged. *New York Times* v. *Sullivan,* 376 U.S. 254 (1964); *Time, Inc.* v. *Hill,* 385 U.S. 374 (1967); *Curtis Publishing Co.* v. *Butts,* 388 U.S. 130 (1967). Plaintiff's theory is that there is no truth to the allegations of Communist sympathies, that he is not a public figure, and that defendant is chargeable with actual malice.

The only evidence submitted relating to the issue of actual malice is the affidavit of Scott Stanley, Jr., managing editor of defendant's magazine. In brief, this affidavit states that the author of the challenged article was a "free-lance" writer, that a number of his works had previously been used by defendant, and that affiant had received no information during such time which "seriously" challenged the truth of the factual averments in the author's writings. He further stated that he had therefore come to rely on the accuracy of his articles and conducted no investigation into the truth of the allegations in suit.

When there is a factual dispute as to the existence of actual malice, summary judgment is improper. See *Goldwater* v. *Ginzburg,* 261 F. Supp. 784 (S.D.N.Y. 1966), *aff'd.* 414 F. 2d 324 (2d Cir. 1969), *cert den.* 396 U.S. 1049 (1970):

> "The issue of actual malice on the part of defendants seems particularly inappropriate for disposition by summary judgment because it concerns 'motive' intent, and subjective feelings and reactions.'" (Citations omitted) (261 F. Supp. at 788)

In the instant case a jury might infer from the evidence that defendant's failure to investigate the truth of the allegations, coupled with its receipt of communications challenging the factual accuracy of this author in the past, amounted to actual malice, that is, "reckless disregard" of whether the allegations were true or not. *New York Times* v. *Sullivan, supra,* at 279-280. And whether these challenges to the author's accuracy were "serious" or not is a matter for the jury, rather than defendant, to determine. See *St. Amant* v. *Thompson,* 390 U.S. 727, 732 (1968); *Curtis Publishing Co.* v. *Butts, supra,* at 169-170 (Warren, C.J., concurring). This court cannot conclude, as a matter of law, that defendant either is or is not chargeable with actual malice.

In accordance with the foregoing, an order has been entered denying plaintiff's and defendant's motions for summary judgment. The trial date has been reset for September 21, 1970, and discovery shall remain open until that date. It is further ordered that defendant's motion for leave to file an amended answer is granted.

Enter: /s/ Bernard M. Decker
United States District Judge

REFUSED INSTRUCTIONS

[171] IPI 5.01 Pl. 5:

If a party to this case has failed to offer evidence or to produce a witness within his power to produce, you may infer that the evidence or testimony of the witness would be adverse to that party if you believe each of the following elements:

1. The evidence or witness was under the control of the party and could have been produced by the exercise of reasonable diligence.

2. The evidence or witness was not equally available to an adverse party.

3. A reasonably prudent person under the same or similar circumstances would have offered the evidence or produced the witness if he believed it to be favorable to him.

4. No reasonable excuse for the failure has been shown.

[172]

If you find that the alleged libelous matter was fair comment on a public issue, then you may not return a verdict in favor of the plaintiff.

GIVEN INSTRUCTIONS

[173] Pl. 14:

The plaintiff's claim has two essential elements, as follows:

First, that the defendant published the magazine article and reprint pamphlet complained of herein;

Second, that the said libels were read by persons other than the plaintiff, namely members of the general public.

The plaintiff has the burden of establishing the essential elements of his case by a preponderance of the evidence. If you find that he has done so you will find for the plaintiff. If you find that plaintiff has not so established either of these elements, then you must find for the defendant.

[174]

In assessing damages you may also award plaintiff such amount as will punish defendant for publishing the untrue defamatory statements concerning plaintiff.

[175] Pl. 13:

If you decide for the plaintiff on the question of liability, you must then fix the amount of money which will reasonably and fairly compensate him for any damages he has suffered that were directly and proximately caused by the articles complained of. When I use the expression "proximate cause" I mean that cause which, in natural or probable sequence, produced the injury complained of. In fixing the amount of damages you are to take into account the following elements:

1. his prominence in the community where he lives.
2. his professional standing.
3. his character.
4. his good name.
5. his reputation.
6. the mental suffering and anguish occasioned by the publication.
7. the extent of the circulation and republication of the libels.

[176] Pl. 12:

Where the publication complained of is libelous per se and the defendant has not proved the truth, the plaintiff is entitled to recover compensatory damages such as will fairly compensate him for the injury he has sustained, if any. Mental suffering and injury to reputation as the result of a libelous publication need not be proved but may be inferred from the nature of the injury.

[177] Pl. 11:

Since this article and reprint pamphlet are libelous per se, plaintiff need not show that he has suffered any actual damage as a result of this article in order to entitle him to a verdict in this matter.

[178] Pl. 15:

The fact that false statements are obtained from another source does not provide a defense to a libel suit. Put simply, a defamatory statement can be repeated and repetition or republication does not render the statement true or correct, nor excuse the defendant from liability therefor. The defendant may not rely upon the author to justify its actions.

[179] Pl. 10:

The article and reprint pamphlet involved herein, insofar as it relates to plaintiff, is libelous per se, because in calling plaintiff a communist, Leninist and communist fronter, it imputes to him a want of the requisite qualifications to practice law, in that a belief in communism is inconsistent with his oath to support the Constitution and Laws of the United States government, and casts

grave doubts upon his qualification to uphold, apply and interpret our system of laws which is opposed to Communist theory.

[180] Pl. Instr. 4:

In reading defendants' articles, the articles must be read as a whole and the words given their natural and obvious meaning. The headlines, sub-headlines, pictures, and captions in the articles must be construed in the context of the articles when read as a whole.

[181] Pl. 9:

The plaintiff has filed suit seeking damages on account of libels in the forms of a magazine article and a reprint pamphlet thereof published by the defendant of and concerning him.

[182] IPI 2.01 Pl. 8:

You are the sole judges of the credibility of the witnesses and of the weight to be given to the testimony of each of them. In determining the credit to be given any witness you may take into account his ability and opportunity to observe, his memory, his manner while testifying, any interest, bias or prejudice he may have, and the reasonableness of his testimony considered in the light of all the evidence in the case.

[183] IPI 2.07 Pl. 7:

In deciding whether any fact has been proved, it is proper to consider the number of witnesses testifying on one side or the other as to that fact, but the number of witnesses alone is not conclusive if the testimony of the lesser number is more convincing.

[184] IPI 21.01 Pl. 6:

When I say that a party has the burden of proof on any proposition, or use the expression "if you find," or "if you decide", I mean you must be persuaded, considering all the evidence in the case, that the proposition on which he has the burden of proof is more probably true than not true.

[185] IPI 1.04 Pl. Instr. 3:

In considering the evidence in this case you are not required to set aside your own observation and experience in the affairs of life but you have a right to consider all the evidence in the light of your own observation and experience in the affairs of life.

[186] IPI 1.02 Pl. Instr. 2:

In determining whether any proposition has been proved, you should consider all of the evidence bearing on the question without regard to which party produced it.

[187] Plaintiff's Instruction (1)
(IPI 1.01 Modified)

1. Faithful performance by you of your duties is vital to the administration of justice.

2. The law applicable to this case is contained in these instructions and it is your duty to follow them. You must consider these instructions as a whole, not picking out one instruction and disregarding others.

3. It is your duty to determine the facts, and to determine them from the evidence produced in open court.

You are to apply the law to the facts and in this way decide the case. Neither sympathy nor prejudice should influence you. Your verdict must be based on evidence and not upon speculation, guess or conjecture.

4. The evidence which you are to consider consists of testimony of the witnesses and the exhibits offered and received. The production of evidence in court is governed by rules of law. From time to time it has been my duty as judge to rule on the admissibility of evidence. You must not concern yourselves with the reasons for these rulings. (And you are not to consider exhibits to which an objection was sustained or testimony or exhibits which were ordered stricken.)

5. Arguments, statements, and remarks of counsel are intended to help you in understanding the evidence and applying the law, but are not evidence. If any argument, statement or remark has no basis in the evidence, then you should disregard that argument, statement or remark. (However, there is one exception to this rule; an admission of a fact by counsel is binding on his client.)

[188]

6. (The corporate defendant in this case is entitled to the same fair and unprejudiced treatment as an individual would be under like circumstances, and you should decide the case with the same impartiality you would use in deciding a case between individuals.)

7. Neither by these instructions nor by any ruling or remark which I have made do I or have I meant to indicate any opinion as to the facts.

[190] VERDICT

We, the Jury, find the defendant, guilty and assess the plaintiff's damages at the sum of Fifty Thousand only—($50,000.00).

[Signatures of Jurists]

JUDGMENT ON VERDICT

Seealed verdict opened in court.

Jury returns following verdict:

"We, the Jury, find the Defendant guilty and assess the Plaintiff's damages at the sum of $50,000.00."

Judgment entered on the verdict in favor of Plaintiff and against Defendant for damages in amount of $50,000.00 and costs.—Decker, J.

[194-198] MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT AND IN THE ALTERNATIVE, MOTION FOR NEW TRIAL

The defendant, Robert Welch, Inc., respectfully moves the Court to enter judgment herein in favor of the defendant, notwithstanding the verdict of the jury entered in this cause on September 23, 1970; and, as grounds for such motion, respectfully shows to the Court:

1. Defendant presented, as one defense to the plaintiff's action, that plaintiff was a "public figure", by virtue of being the author of books, newspaper columns, pamphlets, all of which covered wide areas of public interest and which were published all over the United States, and by virtue of having lectured in public and private forum, appeared in the State of Illinois and nationally on radio and television, many times as a panelist or guest speaker.

2. The facts concerning plaintiff's status as a "public figure", as alleged in Paragraph 3 of the First Separate Defense of defendant's answer, were supported and confirmed by judicial admissions as follows:

(a) Paragraph 3 of plaintiff's complaint.

(b) Motion of plaintiff filed herein on April 30, 1970, seeking protective order limiting the scope of plaintiff's deposition.

(c) And the above facts, which establish the status of plaintiff, as a "public figure" were repeated by plaintiff, during his testimony upon trial of this case.

(d) Plaintiff's status, as a "public figure", was further abundantly established by copies of newspaper articles, published in the City of Chicago, offered in evidence as defendant's Group Exhibit "C", 1 through 43.

3. The undisputed evidence in this case reveals that the plaintiff injected himself into a controversy of great public interest, involving a charge of murder against a Chicago policeman, Officer Richard Nuccio; and, in connection therewith, the plaintiff appeared at the Coroner's inquest upon the body of Ronald Nelson, whom Officer Nuccio was charged with murdering; and, during the course of such inquest, the plaintiff actually interrogated witnesses, and participated in the proceeding, in a capacity as legal representative of the family of the decedent. By reason of such activity, participating in a statutory hearing, the plaintiff became a defacto public official.

4. By reason of the status of plaintiff, as a "public figure" and a "defacto public official", he was precluded from recovering from defendant damages for alleged libel, without proof that such libel was published by the defendant, with actual malice; and there is no evidence in the record of this cause establishing such actual malice.

5. Upon conclusion of plaintiff's evidence, the issues herein set forth were presented to the Court by defendant's motion for directed verdict, which was erroneously overruled by the Court.

Wherefore, defendant prays that the Court enter a judgment herein for defendant, notwithstanding the verdict of the jury in favor of plaintiff.

Motion For New Trial

In the alternative, and separate and apart from issues raised in defendant's motion for judgment notwithstanding the verdict, as above set forth, the defendant respectfully moves the Court to vacate and set aside the verdict of the jury in this cause, as entered herein on September 23, 1970, and the Court's judgment of the same date, as entered upon the said verdict; and as grounds for such motion, defendant respectfully shows to the Court:

1. The Court erred in overruling defendant's motion to dismiss plaintiff's complaint, as evidenced by the Court's order and opinion entered herein on November 18, 1969.

2. The Court erred in overruling defendant's motion for summary judgment, as evidenced by the Court's memorandum opinion and order dated September 16, 1970.

3. The Court erred in overruling defendant's motion to postpone the trial of this case, and to extend the time for defendant to complete its discovery, as evidenced by the Court's order dated September 14, 1970.

4. The Court erred in striking certain allegations from defendant's Amended Answer, as evidenced by minute order entered in this cause on September 21, 1970.

5. The Court erred in ordering, on September 14, 1970, that defendant's discovery, and preparation for trial, should be restricted to a period of one week, and forced defendant to proceed to trial on September 21, 1970.

6. The Court erred in overruling defendant's motion for continuance on September 21, 1970, and forcing defendant to trial, after reasonable and proper grounds for continuance were submitted to the Court, as follows:

(a) Counsel for defendant advised the Court that the trial of Officer Nuccio, who was one of the subjects of the alleged libelous article, was scheduled for October 2, 1970; and, until after such trial, defendant was unable to interrogate Officer Nuccio, the prosecuting attorneys, the defense counsel, and prospective witnesses, all of whom were precluded from submitting to depositions, or other discovery proceedings, until after conclusion of the criminal trial; and defendant was further precluded from using any of the said parties as witnesses in the trial of the instant case.

7. The Court erred in refusing, over the objection of defendant, to admit in evidence relevant, competent and material evidence offered by defendant upon the law of libel under the First Amendment to the Constitution of the United States, as construed by the United States Supreme Court, and under the law of the State of Illinois.

8. The Court erred in giving to the jury, over the objection of defendant, instructions which were contrary to the Constitution of the United States, and the law of Illinois, paricularly instructions which charged the jury that the statements of defendant concerning plaintiff were libelous per se, and instructing the jury as to awarding damages to plaintiff in such amount as "will punish de-

fendant for publishing *the untrue defamatory statements* concerning plaintiff."

9. The Court, having instructed the jury as to awarding damages to plaintiff in such amount as "will punish defendant for publishing the untrue, defamatory statements concerning plaintiff" erred in providing to the jury forms of verdicts which did not separate actual from punitive damages.

10. The Court erred in refusing defendant's tendered instruction concerning "fair comment on a public issue", and presenting the case to the jury in such manner as to deprive the defendant of its defense of fair comment upon a matter of public importance.

Wherefore, defendant prays in the alternative, after presentation of its motion for judgment notwithstanding the verdict, that the Court vacate and set aside the verdict and judgment in this cause, and grant the defendant a new trial upon the above grounds, which materially affected the rights of defendant, and deprived defendant of a fair trial.

/s/ James A. Boyle, Jr.
Attorney for Defendant

[208] NOTICE OF APPEAL

Notice is hereby given that Elmer Gertz, plaintiff above named, hereby appeals to the United States Court of Appeals for the Seventh Circuit from the order setting aside the jury verdict in this cause and granting defendant's motion for judgment notwithstanding the verdict and entering judgment for defendant, entered in this action on December 8, 1970.

Elmer Gertz
By /s/ Wayne B. Giampietro
Attorney for plaintiff
and pro se

PROCEEDINGS, SEPTEMBER 21, 1970:

17 Mr. Feldman: Your Honor, I am Dan Feldman; I am here this morning on behalf of the Sun-Times and Daily News. We are not a party to this litigation, however, we were, at 9:00 o'clock—our librarian at 9:00 o'clock this morning was served with a subpoena asking for material by the Defendant in this case.

I would like to orally move to quash that. I can argue it at your Honor's convenience and I don't know what this is; what the most propitious time—

The Court: What material is involved? What material is being subpoenaed?

Mr. Feldman: Your Honor, the subpoena asks for seven specific copies of the Sun-Times or Daily News, all of which are available in the Public Library, and for the entire morgue file on Mr. Elmer Gertz, a Chicago attorney.

My grounds for moving to dismiss it are—well, let me start with a little background, your Honor: You may know that Judge Garippo for the State Courts
18 has issued an order on the Clerk prohibiting the issuance of any subpoena directed to a newspaper unless there has been a prior hearing on the need and the relevancy of that subpoena.

That order from Judge Garippo arose out of a showing by the newspapers that they received something like over 100 subpoenas in the last year, mostly related to situations in which the newspapers were simply asked to do research that the parties should have been doing, and in most cases, criminal cases,

but people have been using us as an investigating arm, and that's not a newspaper's proper function.

Your Honor may also know that the Attorney General for the Department of Justice has issued a series of guidelines; they are now two months old, I think, which provide roughly the same thing. You cannot subpoena a newspaper—the Justice Department is prohibited from subpoenaing a newspaper, unless it has made a prior showing to Washington with respect to the need and relevancy for that kind of thing.

Now, insofar as I am aware, the problem has not been dealt with yet in civil cases in the United States
19 District Court, and this kind of case, which I assume is a libel case—

Mr. Boyle: Yes.

Mr. Feldman: Is the one which raises the problem.

My grounds for moving to dismiss are, first of all, that it is an abuse of this Court's process to serve a subpoena at 9:00 o'clock on Monday morning to be responded to at 10:00 o'clock Monday morning. I don't—I don't know the circumstances of this setting for trial but I can't believe that there wasn't an opportunity to give somewhat more notice. I think that it is simply abusive to try to put a guy in contempt on one hours' notice. He might not have arrived, as I didn't, your Honor, to work until ten minutes of ten in the morning, and he would have been in contempt before he had ever gotten to work.

Secondly, your Honor, I think an unsorted subpoena like this which seems to reach for material that is available at the Public Library, and it seems to be all back copies of the newspapers of one kind or another, ought to be satisfied by the Defendant

going to the Public Library and getting the information. There is no need to impose upon the newspaper for this kind of thing.

I might say with respect to the specific editions that he has asked for, for the specific copies that he has asked for, they physically do—

The Court: Don't you want to sell your own newspapers?

Mr. Feldman: They don't exist, your Honor. We don't keep them. These are back three years. We microfilm them, and the best that we could do for them is to microfilm a full newspaper for him, and that's a silly—and print it out—and that's a silly thing to do because he only wants one page, which he can get out of the Public Library, and they have a microfilm machine.

Insofar as the subpoena asks for the full morgue file on Mr. Gertz, I have no idea what's in that morgue file, but Mr. Gertz has been a prominent attorney for many years; I think that he is at this—I think that he is violating the First Amendment rights of the newspaper in reaching back for that kind of material, which may or may not be relevant to anything in this lawsuit, and we are a third party —and I would be glad to enlarge on that argument, your Honor, it's the one that we made to Judge Garippo.

I suspect Mr. Gertz may also have some rights in the premises in a subpoena that reaches back for his full life history.

The morgue is available for the internal research purposes of a newspaper. It contains lots of unsorted material. It is a little like getting out of a file an unsorted F.B.I. dossier and giving a party

to a private lawsuit the power to disseminate that unsorted information anyplace or in anyway that he wants to. I regard that as a very dangerous practice, your Honor, and it ought not to go ahead.

Mr. Boyle: May it please the Court.

Mr. Giampietro: Your Honor, may I—before Mr. Boyle replies, may I say something on behalf of the Plaintiff. In the same way, we just found out about these subpoenas this morning when we arrived in court.

I would also object on the ground that, first of all, they are not relevant to this cause; secondly, they
22 are all hearsay and they would not be admissible in any event. So I would join—

The Court: We haven't reached that point yet.

Mr. Novoselsky: Your Honor?

The Court: Yes?

Mr. Novoselsky: Your Honor, I—

The Court: You are here representing whom?

Mr. Novoselsky: I am representing the Superintendent of Police, your Honor.

Mr. Boyle: Now, Judge, can we please have one of these at a time. This is a—this is another subpoena.

The Court: Yes.

Mr. Boyle: May I respond to this one?

The Court: Yes, you may.

Mr. Boyle: I don't have that good a memory.

Now, in the first place, the only reason these subpoenas were served with respect to these newspapers was because of my obligation to anticipate the difficulties of proof in showing that they are the documents, the documents that they are supposed to be.

This is no substitution for investigation. I have in
23 my brief case Xerox copies of everything that I want from them, you see.

But when I anticipate coming up against Mr. Gertz, he is going to say, "How do you know that these are the true and correct copies of these newspapers?"

The Court: Perhaps he will stipulate to it.

Mr. Boyle: If he will so stipulate, I have no need to bother the Sun-Times, no need whatsoever.

The Court: Well, you have got some papers; I am sure that you didn't manufacture the papers. So if you will tell him—

Mr. Boyle: I have—certain of them are papers and most of them are Xeroxed and I have everything that I need, but this is foundational proof. When I am up against him, I expect trouble.

The Court: The motion to quash the subpoena is granted; I mean, if you have everything that you need.

Do you have any objection if counsel will furnish you what he represents to be copies of newspapers, to agreeing that—

24 Mr. Gertz: Your Honor, I do have objections on the ground of relevancy and competency, but on the ground that they are copies, of course not.

The Court: All right. That solves the problem.

Mr. Gertz: I wouldn't take advantage of counsel or the Court by that kind of conduct.

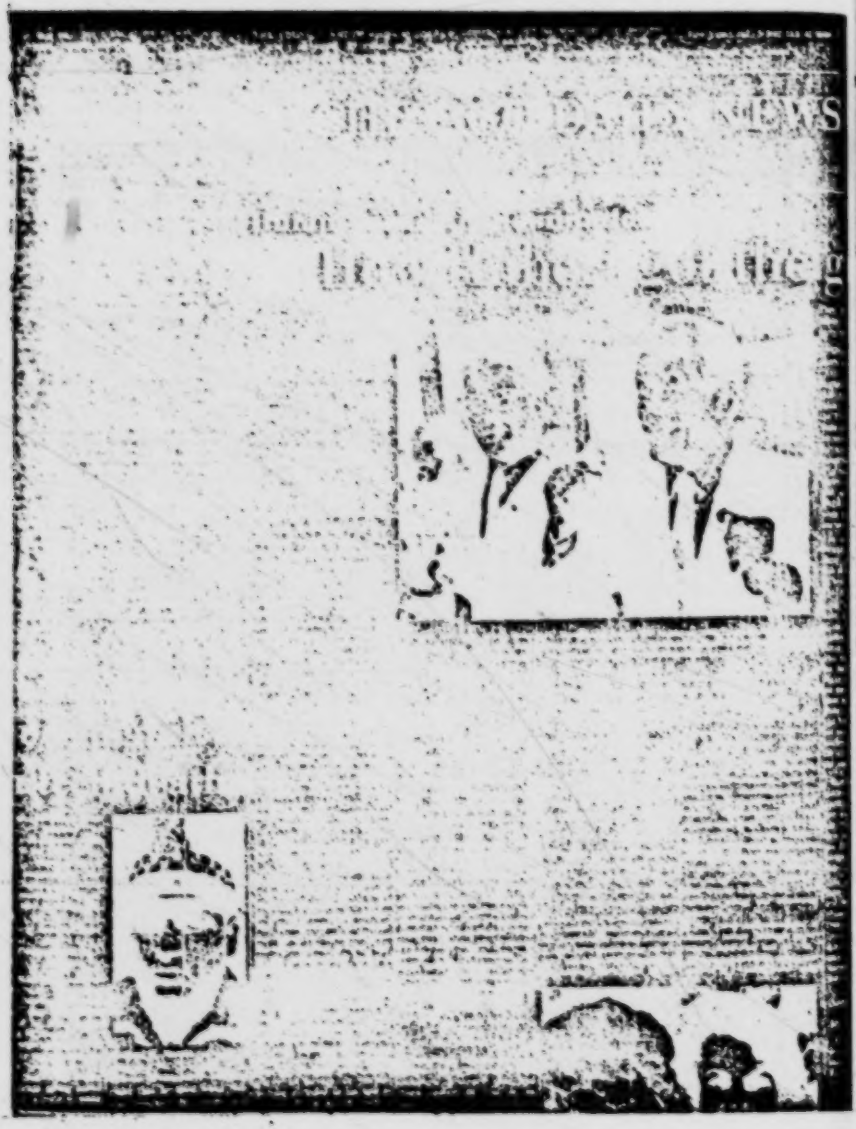
Mr. Boyle: All right. I would like to apologize to you, young man for having discommoded you.

The Court: Well, I think that the Sun-Times can probably recuperate from that.

• • •

DEFENDANT'S EXHIBITS

Exhibit D



CHICAGO DAILY NEWS

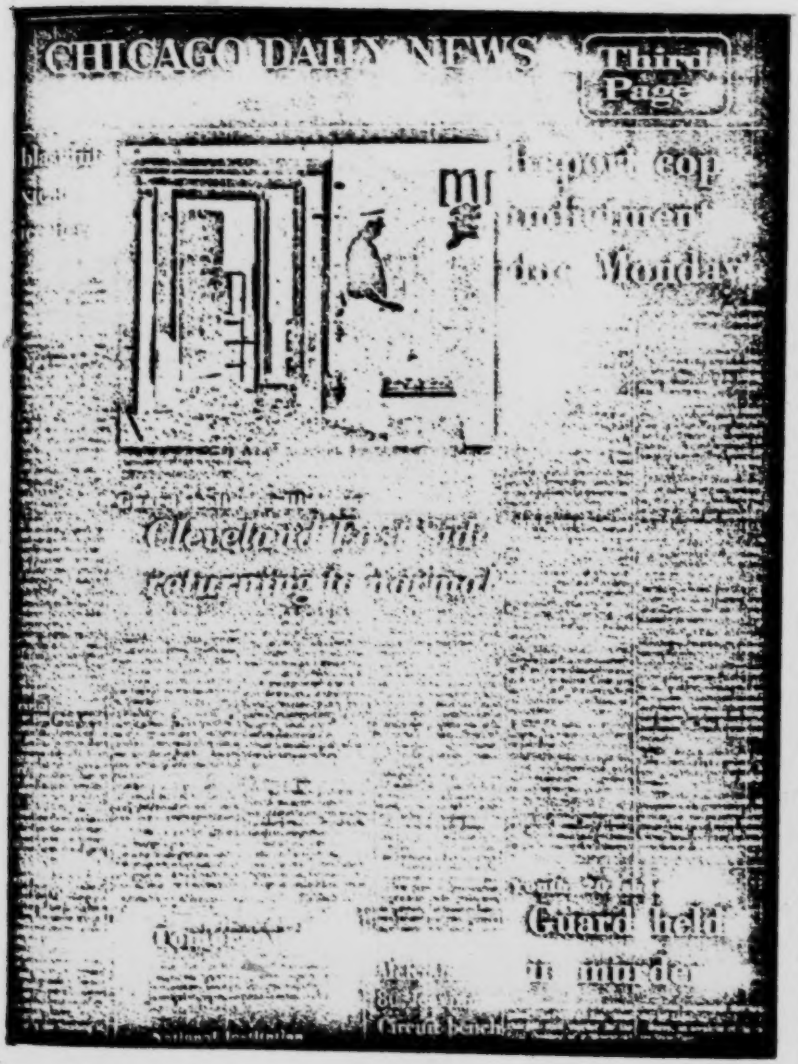
Final Market

Red Streak

All contraception barred

Pope bans birth pill

Controversy still


CHICAGO DAILY NEWS

Third Page

Report on ... Monday

Guard held

Policeman Nurses Gunshot Wound in Neck

Extremists Sought for Murder of U.S. Envoy

Romanians Demand
Russians And Allies
Leave Czechoslovakia

SAVE!
WIGS & FALLS

NATIONAL
DRUG STORES

30 Testimony of SCOTT STANLEY, called as an adverse witness:

• • •

Q. All right. So, speaking about the April 1969 issue of American Opinion, which really comes out in March, the manuscript would normally go to the printer, then, in about the third week in February? Is that correct?

A. Yes; late February.

Q. I show you a magazine which has been marked as Plaintiff's Exhibit 1 for identification and ask you if you have ever seen that before.

A. (Examining document.)

I certainly have.

Q. And is that a magazine which in fact—which is in fact published by Robert Welch, Incorporated?

A. I believe it to be. Yes, it is.

Q. And was that magazine published under your direction?

A. I edited this magazine.

Q. All right. Now, that means that you edited all portions of that magazine, is that correct?

A. Everything but the advertising.

Q. All right. Now, is there anything which appears in that magazine which you yourself wrote?

A. Yes.

Q. And—well, calling your attention specifically
31 to the inside cover, did you write the article, the material, which begins on there, "Dear Editor"? Excuse me—I mean, "Dear Reader".

A. Yes, I did write that material.

Q. You did write that material?

A. Yes.

Q. Now, did you write the lead-in to the story which appears on page 1?

A. By "lead-in" do you mean the title?

Q. Well, all right. Did you write the title for that article?

A. Yes, I did.

Q. All right. Now, there is a short introductory paragraph which—which I perhaps might just as well read, which states:

> "Alan Stang is a former business editor for Prentice-Hall, Inc., and a television writer, producer, and consultant. Mr. Stang is a frequent contributor to American Opinion and is author of the Western Islands best-sellers, It's Very Simple and The Actor. Alan Stang has just returned from an investigative trip to Chicago, where he conducted extensive research into the Richard Nuccio Case."

32 Did you write that material?

A. Yes, I did.

Q. Now—so it is your language which says that Mr. Stang ". . . conducted extensive research into the Richard Nuccio Case"?

A. That is my language.

Q. Now, do you have any first-hand knowledge of the research which Mr. Stang conducted into this Richard Nuccio case?

Mr. Boyle: Just a minute, if you please. Your Honor?

The Court: Yes?

Mr. Boyle: I think that counsel should establish at which time in history did he have first-hand knowledge of the research.

The Court: At the time that he—

Mr. Giampietro: At the time that he wrote that.

The Court: At the time that he wrote that—

Mr. Giampietro: At the time that he wrote that—

The Court: At the time that he wrote that, had he conducted any research?

33 Mr. Giampietro: Right.

Let me rephrase the question.

The Court: Not had he conducted any research, the question is simply, was he aware that Stang had conducted some research or investigation, had made some investigation at that time?

Mr. Giampietro: That is correct.

The Court: Were you aware of that?

The Witness: Yes, sir.

By Mr. Giampietro: Q. And—but did you have any first-hand knowledge of the research which Mr. Stang conducted?

A. Well, do you mean was I there when he did it?

Q. That's right.

A. No, I was not there when he did it.

Q. So your entire information as to what research was conducted by Mr. Stang came from Mr. Stang himself?

A. That is correct.

Q. All right. Now, you have also stated that the material which appears on the inside front cover of

34 this April 1969 issue of American Opinion was written by you, is that correct?

A. That is correct.

Q. Now, you stated in there, and I am quoting now:

"We do know that when American Opinion's Alan Stang goes after the facts on a story, he gets them, just as he has again in the very important article beginning on page 1."

Did you write that language?

A. I did.

Q. Now, you state in here that Mr. Stang has gotten the facts, gotten the facts in this article to which you refer.

Now, upon what did you base your statement that Mr. Stang had gotten the facts?

A. The considerable reputation of Mr. Stang.

Q. I see. Did Mr. Stang himself tell you that he had gotten the facts?

A. That's implied, an implied relationship between an author and an editor.

Q. I see. But he never really told you specifically that he had gotten the exact facts?

A. I am sure that he did.

Q. Do you recall when this was?

35 A. No doubt in the—in one of our telephone conversations during the period that he was in Chicago.

Q. I see.

You also stated in this, and again I quote:

"Mr. Stang reports this month on the framing for murder of an outstanding Chicago police officer—a man with no less than 26 formal citations for the excellence of his police work."

Did you have any actual knowledge of the 26 formal citations for the excellence of Officer Nuccio's police work?

A. Do you mean had I seen them?

Q. Yes.

A. No, I had not seen them.

Q. Had anyone else from the editorial staff of American Opinion magazine seen them?

A. Not all 26.

Q. All right. Again quoting from your article—or your statement—which says that:

"That this is a part of the Communist war on
36 our police is as certain as the innocence of the officer they have chosen as their symbolic target."

From where did you get this information that this was part of the Communist war on our police?

A. From Mr. Stang's article and from our previous commentaries and my general reading on the subject of the Communist attack on our police.

Q. I see. So your information regarding this specific incident came from the reading of this article?

A. It did.

Q. All right. Now, you again state, and again I am quoting:

"So important is this one, in fact, that reprints will be made immediately available."

Now, what was this importance to which you refer that made it imperative that reprints be made immediately available?

A. Mr. Stang states in his article that he thought that it was very important that it be distributed in order to cause a public awareness of the facts in the case of Officer Nuccio.

37 Q. All right. So, again, you got your information from the article itself?

A. That is correct.

Q. All right. Did you yourself make any attempts to verify any of the information appearing in this article other than speaking to Mr. Stang?

Mr. Boyle: At what time in history, your Honor?

By Mr. Giampietro: Q. At the time at which the article was printed.

The Court: I assume that this all relates to prior to the time the article was issued.

Mr. Boyle: Thank you, your Honor.

The Court: Without—

By the Witness: A. No; I relied upon Mr. Stang.

By Mr. Giampietro: Q. All right. Did anyone else from the staff of American Opinion magazine do anything to check on any of the facts which appeared in this article?

A. No one else edited the article, I alone saw it and handled it.

38 Q. I see. All right. Now, I think that you stated that you had no first-hand knowledge of what Mr. Stang did to obtain the facts which appeared in the article, is that correct?

A. No first-hand knowledge.

Q. The only thing that you knew about that is what Mr. Stang may have told you?

A. That is correct.

Q. Did Mr. Stang come to you with the idea for this article or did you come to him with the idea for this article?

A. I went to Mr. Stang with the proposal that he investigate the circumstances around the indictment of Officer Nuccio in Chicago.

Q. All right. Now, that was an article which—or a subject, I should say, which you felt bore some looking into?

A. I did.

Q. The idea was generated within the American Opinion magazine?

A. It was.

Q. And this was to fit the specific needs of the American Opinion magazine, is that correct?

A. Yes, that's correct.

Q. Now, at the time this article was received
39 by you in its manuscript form, did you know Mr. Elmer Gertz?

A. No.

Q. Had you ever heard of him before?

A. The only time—the only time I had heard of Mr. Gertz was when I—in one of my telephone conversations with Alan Stang.

Q. All right. So, again, at the time that this article was printed, the only knowledge you had of Mr. Gertz was from—

A. No; I had a little more knowledge.

Q. And where did you obtain that knowledge?

A. The nature of my telephone conversation with Mr. Stang, I had asked him to name anybody who was well enough known in Chicago that we could get a picture of him from one of the local newspapers and he said that he didn't know who but that—he gave us four, five or six names. I had my secretary call some of the newspapers. I think that she finally got a picture of Mr. Gertz from the Chicago Tribune.

Q. By the way, referring to the pictures in the magazine, who wrote the captions for these pictures?

A. I did.

40 Q. You did?

A. Yes.

Q. Now, on page 9 of the April 1969 issue of American Opinion, there appears a picture of the plaintiff in this case and it says: "Elmer Gertz of Red Guild harasses Nuccio."

Where did you get the information to write that caption?

A. All captions are written on the basis of information in the articles.

Q. I see. Now, by the way, what is the "Red Guild"?

A. It is a general reference to the National Lawyers Guild.

Q. I see. So the "Red" attached to the "Guild" is your language which you attached to this?

A. That is opinion.

Q. I see. Now, when you say "opinion" what do you mean by "opinion"?

What opinion does that show?

A. We advertised ourselves as a journal of opinion and it shows that it is our opinion that Mr. Gertz of the Red Guild had been harassing Officer Nuccio.

41 Q. My question is, what opinion are you expressing when you say the "Red Guild"?

A. That it is our opinion that the National Lawyers Guild is a Red organization.

Q. What do you mean by "Red"?

A. I mean that it is a radical organization and, more specifically, with regard to the National Lawyers Guild, that it has been cited by committees as a, as a—I believe in one instance it was called the "Foremost Legal Bulwark of the Communist Party."

Q. Well, that's one of the things that Mr. Stang says in the article, isn't that right?

A. Well, I also—I also knew of that.

Q. Well, I mean, you know, I don't want to harass you or anything but I just wish that you would answer my questions.

A. I want to do that.

Q. All right. And that's what Mr. Stang states in his article, this specific article that we are talking about, is that not right?

A. He states what?

Q. That the National Lawyers Guild is "one of the foremost bulwarks of Communism in the United States"?

42 A. He uses the precise language and quotes it there, yes.

Q. All right. Now, so when you say that Elmer Gertz ". . . of the Red Guild harasses Nuccio," you are saying that Mr. Gertz is connected with the National Lawyers Guild, which you say is a Communist organization, is that correct?

A. I believe that we say that it is a Communist front organization.

Q. All right. Do you in any way distinguish between a "Communist front" and a "Communist organization"?

A. It depends upon the degree to which the front is manipulated by the Communists.

Q. But you are intending to indicate that any connection with the National Lawyers Guild indicates a connection of Mr. Gertz with a Communist organization?

A. No, with a Red organization.

Q. Well, what is the difference between a "Red organization" and a "Communist organization"?

A. Well, "Red" is a—do you really—the history of "Red" of course goes back to—its choice as early as the French Revolution as the color of International Socialism and National Socialism.

43 It has been used historically as an indicator of radical Socialist activity and it is still so used.

Q. Now, you also say in your caption underneath the picture of Mr. Gertz that he had been harassing Mr. Nuccio; what did you mean by that?

A. I meant to indicate what Stang says in his article.

Q. And Mr. Stang says in his article that Mr. Gertz had filed three lawsuits on behalf of the Nelson family against Mr. Nuccio?

A. That's correct, yes, he does say that.

Q. So when you say that Mr. Gertz is harassing Mr. Nuccio, you are saying that he has filed suits on behalf of clients against him?

A. Yes, that's correct.

Q. All right. Thank you.

Do you have any knowledge that—

Mr. Giampietro: Well, strike that.

By Mr. Giampietro: Q. What is the "Marxist League For Industrial Democracy"?

A. That is one of a long series of Fabian Socialist
44 organizations which has been active in this country for many years.

Q. Now, is the name of that, the "Marxist League For Industrial Democracy" or is "Marxist" something which Mr. Stang has attached to the name of that organization?

A. "Marxist" is a proper adjective in this case but it is not a part of the formal name of the League For Industrial Democracy.

Q. Did you know at the time that this article was printed whether or not Mr. Gertz had been an official, or, indeed, even a member of the League For Industrial Democracy?

A. I relied upon Mr. Stang.

Q. All right. So you yourself—

The Court: I understand that he said in connection with all of the—with the entire contents of the article, that he relied on Mr. Stang, so you don't have to ask him about specific items.

Mr. Giampietro: That's right.

The Court: That's right, isn't it?

The Witness: That is correct.

Mr. Giampietro: All right.

45 By Mr. Giampietro: Q. Now, Robert Welch, Incorporated, is named after Mr. Robert Welch who is the founder of the John Birch Society, is that correct?

A. That is correct.

Q. And American Opinion magazine is the magazine which espouses the doctrines and viewpoints of the John Birch Society, is that correct?

A. We are very close.

Q. All right. Now, what process does each article undergo before it is actually printed in the magazine?

A. Well, it is conceived, there is a discussion with the author, the author agrees to do the article and commences his—begins his research.

Q. Now, after you receive the manuscript from the author, what then must be done with the manuscript?

A. Well, it depends a great deal upon who the author is.

• • •

48 Q. When did the American Opinion for the April 1969 issue—when would it be distributed? When was it sent out?

A. It was mailed—they began mailing it from the plant of our printer in Lowell, Massachusetts, on the third day of March of that year.

Q. And when did you receive the manuscript for the article which we have been discussing, "Frame-up"?

A. The 18th day of February.

Q. And when was that manuscript sent to the printer?

A. Oh, within 24 hours, I imagine.

We worked straight through on it.

Q. Okay. Now, why was it that this article was received so close to the time of the publication of the magazine?

A. Well, it was received so close because the Nuccio—we probably—Stang had come to Chicago, gone to work on the piece; he had just finished it and we —we considered this a very important case and we wanted to get it in as soon as possible.

Q. So I think that it is fair to say that—

(Brief interruption.)

49 By Mr. Giampietro: Q. I think that it is safe to say, then, that the magazine—or that this article was in your hands for a considerably shorter period of time than is normal in the conduction of your business?

A. It was only in my hands—it was only actually in my hands for about four hours.

Q. I see. All right. By the way, when did you destroy the manuscript?

A. I didn't—

Q. When did you destroy the manuscript for this article?

A. I didn't destroy—those—our manuscripts and galleys and page proofs are disposed of by a secretary or somebody who carries out things after we get an issue to bed and printed.

We are after finished-type, published material and we don't save wastepaper.

Q. All right. So this was destroyed by someone on your staff immediately after the magazine itself was printed, is that correct?

A. Well, I imagine that it was carried down by the cleaning man, who is not, really, on my staff.

Q. But it was given—

50 A. Right.

Q. Given to him to so destroy by someone—

A. Right. It was put out and he carried it away, right.

Q. All right. By the way, referring again to the language which appears on the inside front cover of the April 1969 issue of the American Opinion, issue of American Opinion, when did you write that language?

A. I wrote it very tightly against the deadline. That's the last thing that can be done in any issue.

Q. Was it written before or after you received the manuscript of "Frame-up"?

A. It was written after. naturally.

Q. How about the lead-in paragraph on the magazine on the article itself? When was that written? Was it written before or after you had received the manuscript of the article?

A. I don't—I don't remember whether it was written before or after. It was very close to the time; whether it may have been shortly before or shortly after I received it—

Q. Have you ever heard of American Opinion Bookstores?

A. Yes, I have heard of them.

51 Q. And would you tell me what an American Opinion Bookstore is?

A. An American Opinion Bookstore is a bookstore with a kind of a reading room that sells books. It is a bookstore for the sale of conservative and patriotic literature; American flags, eagles, books or magazines that we publish and some from the leading publishers in America and the world.

Q. Is there any connection between American Opinion magazine and the American Opinion Bookstores?

A. We are both children of the same corporate father.

Q. I see. And the American Opinion magazine is sold in and through the American Opinion Bookstores, at least in part?

A. In—they sell our magazines.

Q. Now, how many American Opinion Bookstores are there, do you know?

A. I don't know the exact number. I have heard from other—I have heard from members of the staff

an approximate figure, which I could give you. It would be close, I think.

Q. All right. What is that approximate figure?

A. Somewhere around 275 or 280.

52 Q. And where are those bookstores located, if you know?

A. Well—

The Court: All over the country?

The Witness: All over the country.

The Court: Some in Illinois?

The Witness: Yes, sir.

By Mr. Giampietro: Q. And each one of these bookstores would sell copies of the American Opinion magazine, is that correct?

A. To my knowledge, they all do. I hope that they do.

Q. Now, how is the American Opinion magazine distributed? Is that distributed solely on over-the-counter sales or do you also have a subscription list?

A. Oh, yes, it has a subscription list.

Q. And it is sold over-the-counter as well?

A. That is correct.

Q. How many people are on your subscription list?

Or, how many are—

Mr. Giampietro: Strike that.

53 By Mr. Giampietro: Q. How many were on your subscription list at the time that the April 1969 issue was sent out?

A. I don't know the exact number; I can tell you what a print run is and I can tell you approximately what it is.

Q. And will you tell us that.

A. Yes. The print run on that particular issue was forty-four thousand, something, and we don't normally print more than two thousand extra copies, so I imagine that it was about 42,000 circulated through our subscription list.

Now, our subscription list is not a normal—it is not run in the normal manner. Now, we have about half of that—about half of that, about half of that forty-some-odd thousand is people who send in their money, like you do for a normal magazine. The other half is from our friends that we call "standing order agents"; people around the country who think that our magazine ought to be on newsstands, and so they subscribe to buy five copies or four copies a month and they contract with us to do that, and we send them to them and then they take them to their local grocery store or to the drug store, or
54 wherever magazines might be sold, and place them with the individual entrepreneur. That's the other half of our—it is about half and half, with probably —it really isn't that any more, it is probably about, oh, it is probably about 24,000 to 18,000 in favor of those who send in their dollars for the regular subscription.

Q. By the way, do you receive any returns of any of these magazines?

A. No, we do not.

Q. And they remain on the newsstands indefinitely?

A. Well, I hope—I hope that they don't.

Q. Again calling your attention to this April 1969 issue of American Opinion magazine, on page 18 there

is a statement at the end of the article "Frame-up" which says:

> "Because of the importance of the preceding article to the national Support Your Police Committees, and because time in this case is so terrifically short, additional copies of this important article are immediately available in any quantity . . ."

Now, did you write that language?

A. I did.

Q. Were reprints in fact made of this article?

55 A. They were.

Q. I show you a document which has been marked Plaintiff's Exhibit 2 for identification and ask you if this is one of the reprints which was made of this article?

A. (Examining document.)

Yes, it is.

Q. And that was printed and published by Robert Welch, Incorporated, is that correct?

A. It was published by us; it was printed by our printer at Lowell, Massachusetts.

Q. It was printed at your direction?

A. That is correct.

Q. And can you tell me how many copies of this reprint were printed?

A. Yes; there were 6,000; I mean, excuse me, there were 86,000.

Q. Do you know what happened to those 86,000 reprints?

A. Not every one. I know that 74,000 of them were sold outside of the State of Illinois; that about —under 5,000 were sold in the State of Illinois.

Q. Do you know to whom these reprints were sold in the State of Illinois?

56 A. It would be very hard to—no, I don't know. I know of—there was one large order of 3,300, which was a large order for us, from the Elmhurst American Opinion—the American Opinion Bookstore, Elmhurst, Illinois.

Q. And that bookstore is, as you have said before, a sister affiliate of yours with the John Birch Society, is that correct?

A. It is.

Q. Do you know if any reprints of this article are still being distributed?

A. I know that we are not distributing them.

Q. Can you tell me when the last time was that you sold any of these reprints?

A. I can't tell you exactly. I know that it was—we stopped it on advice of counsel; said that it wasn't good to continue distributing it until this matter is cleared up, and that was some time this spring.

Q. I see. So until the spring of 1970 you were still sending out reprints of this article?

A. We were still providing them to—to our bookstores and people who ordered them, yes, we were.

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145 ELMER GERTZ, called as a witness in his own behalf, having been previously duly sworn, was examined and testified further as follows:

Cross Examination (Resumed).

The Court: Good morning, ladies and gentlemen. We didn't keep you back there purposely, we had a

lot of customers to take care of. We are ready now to start.

Mr. Boyle: May it please the Court—

The Court: You may proceed.

Mr. Boyle: Thank you.

By Mr. Boyle: Q. Mr. Gertz, were you ever a lecturer at a school known as the Abraham Lincoln School?

A. I don't have any recollection of such. I lectured many places.

Q. Mr. Gertz, during your lifetime, have you written books?

A. Yes; over the last 40 years I have written three books.

Q. All right. And during your lifetime, have you written articles for newspapers?

146 A. Yes, a number of articles.

Q. Will you please elaborate on that; tell us how much and in what papers and over what period of time.

A. Well, I—

Mr. Giampietro: Your Honor, at this time I am going to object to that question. I think that, first of all, it is too general and it goes too far afield.

Secondly, I do not feel that it is relevant to this proceeding.

The Court: Overruled. It is general, I will admit that, but perhaps that's the fastest way to get the information.

By The Witness: A. Would you repeat the question, please.

The Reporter: ". . . would you elaborate."

By The Witness: A. Oh, I have written reviews of books for several nwspapers, the Chicago Sun Times, and, before that, the Chicago Sun, and the Chicago Daily News occasionally, and, when I was a kid, for the Chicago Evening Post.

147 I have also occasionally written reviews for other magazines and publications.

By Mr. Boyle: Q. Did you write anything for the Chicago Defender?

A. Yes, while I was in college over 40 years ago I wrote poetry for the Chicago Defender and sometimes articles.

Q. Did you write anything for the Chicago Courier?

A. I wrote, over a short period of time, a series of articles, simplifying legal problems, such as wills, such as the rights of Defendants, and a few things like that.

Q. Did you write anything for the Chicago Jewish Forum?

A. Yes.

Q. Would you tell us what that was?

A. The Chicago Jewish Forum was a publication published and edited by a friend of mine. It had articles of general interest to Jews and minority groups and it had stories and poems and art and occasionally during the period of its publication I wrote articles or book reviews for it.

148 Q. With respect to your writing newspaper articles or reviews, do you do so currently?

A. Yes. Now and then I write reviews for the Chicago Sun Times.

Q. Mr. Gertz, with respect to your radio appearances, have you ever made any radio appearances?

A. Oh, yes.

Q. And once again, may I ask a general question and ask you to give us a summary of your life experience in that regard, as you can recall it.

Mr. Giampietro: Your Honor—

The Court: I understand that you are objecting to this entire line of questioning.

Mr. Giampietro: That is right. I just wanted the record to show.

The Court: Yes.

Mr. Giampietro: To show a continuing objection.

The Court: Yes.

By The Witness: A. All right. I have been interviewed in connection with some cases that I have
149 been involved in and I have appeared on radio and television programs throughout my professional career.

By Mr. Boyle: Q. Have you appeared—how many different radio stations have you appeared on in Chicago, sir, during your lifetime?

A. At one time or another, I suppose practically all of them.

Q. And have you appeared on radio and television programs in cities other than Chicago?

A. Yes, now and then.

Q. What cities, sir?

A. When I was the attorney in a case in Dallas, Texas, I was interviewed in connection with that case, and in Cleveland when I was there in a case I was interviewed with respect to it and several other cities. Most of my appearances have been in Chicago.

Q. All right. Yes, sir. Have you ever appeared on panel shows in Chicago, on television or on radio?

A. Several times, yes.

Q. Within the last few years, have you appeared
150 on panel shows in Chicago?

A. Yes. I remember appearing on panel shows—a panel show with respect to capitol punishment.

Q. Were there any others? Just one in the last several years?

A. No, no; there were several others.

I have appeared on panel shows with respect to First Amendment rights with respect to publication.

Q. Did you ever appear on the Kup Show?

A. Some years ago.

Q. All right. Well, during the time that you appeared on panel shows and made your various radio addresses, what was the scope of the subject matter covered by you, in a general way? Can you tell us that?

A. When I was on At Random—that's the C.B.S. show, it is a conversation show; you can never anticipate what the subject matter will be. Almost anything under the sun.

Q. Mr. Gertz, what I am trying to get at is that, your presentations over the media of radio or television communications has certainly not been confined to purely legal subjects, has it?

151 A. I would say most of my appearances have been interviews in connection with cases in which I have been the attorney on one side or the other. But sometimes, other matters.

Q. But you have spoken—have you spoken on political issues, sir?

A. Political, for candidates, no.

Q. Not for candidates, I mean political philosophies, socio-phenomena of, say, Communism?

A. No. I don't recall ever appearing on a show devoted entirely to that.

I have been on shows in which public issues were discussed and the subject of Communism would come up and other subjects would come up which were peripheral to it, but these were all informal, unrehearsed shows where you could never tell what would come up.

Q. How many times in all do you estimate that you were interviewed, either on radio or television, during the year 1969?

A. During the year 1969, that was one of the leaner years; not too many times during that year.

Q. Well, by—what do you mean by "not too
152 many times"?

A. Relatively few times, up until the tail end of the year, but that was a year in which I did not appear very often on radio or television.

Q. But you did appear?

A. A few times, yes.

Q. Yes. Mr. Gertz, I will change to another subject, and that is, would other people—have other people written articles about you in your lifetime that appeared in the Chicago papers?

A. Yes. I was involved in some cases that you might call well known, or even notorious cases, and in connection with them there were, sometimes, newspaper articles.

Q. Mr. Gertz, I hand you herewith Defendant's Group Exhibit C for identification, 1 through 43, and ask if you can tell us generally what that is.

A. (Examining documents.)

Mr. Giampietro: Your Honor, I will have to object to this.

The Court: This is your continuing objection.

Mr. Giampietro: No, I am objecting to the form
153 at this time, your Honor. The question—he is handing him a great sheath of documents and asking the witness what they are.

The Court: You represent to him that it consists of what?

Mr. Boyle: I represent that it consists of articles from the Chicago papers concerning Mr. Gertz over a period of a lifetime.

By The Witness: A. From what I could judge by glancing at these, these are articles that have appeared from 1942 to more recent date, dealing sometimes with me alone and sometimes with me in connection with other subject matters. Some of them are very short articles, some a little longer, on various subjects. Mostly, I would say, cases that I have been involved in or activities that I have been involved in.

By Mr. Boyle: Q. May I have the exhibits, sir?

A. Surely.

Mr. Boyle: I have no further questions.

The Court: No further questions?

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171 MICHAEL M. KACHIGIAN, called as a witness by the Plaintiff, having been first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Giampietro.

Q. Will you state your name and address, please?

A. Michael M. Kachigian, 1901 North Sayre.

Q. Please speak up so that all of the Jurors can hear you.

A. Yes. Chicago, Illinois.

Q. What is your business or profession?

A. I am an attorney.

Q. How long have you been engaged in that profession?

A. I have been practicing approximately 15 years.

Q. And would you give us some kind of a general idea of what kind of practice you are engaged in?

A. Yes. I deal with criminal matters. I am in general practice. I represent quite a few corporations, and things of that nature.

172 Q. Now, do you know Mr. Elmer Gertz?

A. Yes, I do.

Q. How long have you known Mr. Gertz?

A. I have known Mr. Gertz personally for about a year and a half; a year—I would say about a year, a little over a year.

Q. All right. And have you had occasion to meet him professionally?

A. Yes, I have.

Q. Now, during this time, you have known him and prior to the time that you have known him personally, have you had occasion to discuss Mr.

Gertz or heard him discussed with other members of the legal profession?

A. Yes, I have.

Q. As a result of those discussions, are you acquainted with his reputation in the community of Chicago prior and on April, 1969, for truth and veracity, honesty and integrity, being a good and loyal citizen for the United States and as an attorney?

A. Yes.

Q. Now, what is his reputation for truth and veracity?

173 A. Excellent, to my own knowledge.

Q. What is his reputation for honesty and integrity?

A. Very good.

Q. What is his reputation as a good and loyal citizen of the United States?

A. Excellent.

Q. And what is his reputation as an attorney?

A. Very good.

Q. During the time in which you have known Mr. Gertz, have you ever known him to espouse the violent overthrow of the United States Government?

A. No, I have not.

Q. Have you ever known him to have been a member of the Communist Party?

A. No, I have not.

Q. Or a member of any Communist organization?

A. None to my knowledge.

Q. Have you ever heard him espouse the Communist doctrine in any way?

A. None; no.

Q. Mr. Kachigian, are you familiar or do you know a man by the name of Richard Nuccio?

A. Yes, I do.

174 Q. And in what capacity do you know Mr. Nuccio?

A. As his attorney and as his family attorney.

Q. How long have you known—how long have you been Mr. Nuccio's attorney?

A. Approximately three and a half years.

Q. And how did your association with him come about?

A. I had known his family for quote some time but I particularly represented his interest when he became involved in a shooting as a police officer while on duty and he was indicted by the State's Attorney's office.

Q. And he was accused of having shot a boy by the name of Ronald Nelson, is that correct?

A. That is correct.

Q. And did you participate in the defense of Mr. Nuccio in that criminal trial?

A. I did, as co-counsel with Mr. Echeles.

Q. And you are still a representative of Mr. Nuccio, is that correct?

A. Yes; in fact, I think that we are going to trial next month.

175 Q. Now, did you—

Mr. Boyle: I beg your pardon, I didn't hear—

The Court: Julius Lucius Echeles?

The Witness: Julius Lucius Echeles, yes, your Honor.

Mr. Boyle: May I have the answer to that last question read.

The Witness: Yes; I believe that it goes to trial next month.

The Court: He says that it goes to trial next month.

Mr. Giampietro: That it goes to trial next month.

Mr. Boyle: The Nuccio case will be retried?

The Witness: Yes.

By Mr. Giampietro: Q. Now, in connection with the Nuccio case, did you ever hear of Mr. Gertz being involved in that case in any manner?

A. None to my knowledge.

Q. To your knowledge, was he involved in the prosecution of Mr. Nuccio in any manner?

176 A. None to my knowledge, no.

Q. Wre you aware that he had filed a civil suit against Mr. Nuccio?

A. No, I was not.

The Court: When did you become aware of that? Aren't you aware of it now?

The Witness: I don't believe that I am aware of it now.

By Mr. Giampietro: Q. Mr. Kachigian, did you ever see Mr. Gertz at the trial of Mr. Nuccio, the criminal trial which was held?

A. I don't believe so.

Q. Were you aware of any conspiracy or any plot to harrass or to frame Mr. Nuccio?

A. None has ever been called to my attention, no.

Q. All right. Now, were you aware or did you ever hear of any Communist conspiracy to harrass or to frame Mr. Nuccio for this alleged crime?

A. No, none to my knowledge.

Q. So, as far as you know, Mr. Gertz was never
177 involved in any way in any prosecution or harrassment of Mr. Nuccio, is that correct?

A. Not that I know of, no.

Q. Mr. Kachigian, did you ever hear of a man named Alan Stang?

A. I don't believe so.

Q. Did Mr. Stang ever contact you in connection with the Nuccio case?

A. Not to my knowledge.

Q. And you never talked to him, as far as you know?

A. No.

Q. You never gave him any information of any kind?

A. None; absolutely none.

Mr. Giampietro: Thank you, no further questions.

The Court: Cross examiner.

Cross Examination by Mr. Boyle.

Q. I'm sorry, I didn't hear your name?

A. Kachigian, Michael M. Kachigian.

The Court: Do you want to spell the last name for his benefit?

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184 WINFIELD SCOTT STANLEY, JR., called as a witness by the Defendant, having been previously duly sworn, resumed the stand and testified further as follows:

Direct Examination by Mr. Boyle.

Q. Mr. Stanley, was Mr. Stang, the author of the article, ever an employee of Robert Welch, Inc.?

A. No, he was not.

Q. Is he now an employee of Robert Welch, Inc.?

A. No, he is not, he is a freelance.

Q. Now, Mr. Stanley, when you decided to send Mr. Stang, or ask him to go to Chicago, what was the story that you sent him to get, to inquire about?

A. Well, the story—

Mr. Giampietro: Excuse me, your Honor. I didn't hear that question.

185 Mr. Boyle: I asked him what story was he sending him after, what prospective story did he have in mind when he sent him.

The Court: When Mr. Stang was sent to Chicago. What was his assignment?

I think that it was covered yesterday, but, very briefly, what was it?

The Witness: I wanted to know whether, in the opinion of Mr. Stang, the Nuccio murder trial and the publicity around it were part of a continuing Communist effort to blacken the reputation of America's police officers.

By Mr. Boyle: Q. Now, had your paper in the past ever used that as a theme in any way, this Communist conspiracy to harrass police?

Mr. Giampietro: I object to that, your Honor.

The Court: Well, he may answer yes or no, without going into any great detail.

Had that been a theme that you had used before?

186 The Witness: Since 1960.

By Mr. Boyle: Q. All right. And did your magazine, together with the John Birch Society, react to that in any specific way, that theme? Did they do anything?

Mr. Giampietro: Your Honor, I object to that, too.

The Court: Well, he may state generally.

What did you do about it, I mean, did you write articles about it?

The Witness: We wrote articles and maintained a national Support your Local Police campaign, with committees in nearly every City in the United States, trying to urge all Americans to support their local police and keep them independent of Federal control and manipulation.

Mr. Giampietro: Your Honor, I must object to that and ask that that be stricken. That's not an answer, it's a speech.

The Court: Well, objection overruled.

187 By Mr. Boyle: Q. Now, on the years preceding the incident where you sent Mr. Stang out to Chicago, in those years, do you know whether or not any other publications also dealt with that same theme, dwelled on that same theme of a Communist conspiracy to harrass the police?

Mr. Giampietro: Your Honor, again I object. This man—

The Court: Generally he may state the context in which this assignment was given to this particular reporter and this is all that he is doing. I mean, I am not permitting him to go into any detail, I am simply permitting him to state that this was at that time, at least, in their opinion, a public issue. That's all that is being said here.

By The Witness: A. Literally thousands of newspapers across the country were discussing this matter and it was a major national issue, in my opinion.

By Mr. Boyle: Q. Do you know whether that
188 issue was discussed in the years preceding the incident that we are talking about in any Governmental Agency and published?

Mr. Giampietro: Your Honor, again I will object. This is not a proper question for him to ask as to whether—as to what he knew as to several unspecified documents from some Governmental Agency.

The Court: Well, we are not going to go into the contents of the documents.

Mr. Boyle: Not at all.

The Court: But simply as to his general knowledge as to what other people may have been writing about on the same subject and whether they were writing about the same subject. This is all that I assume that he is doing.

Mr. Boyle: That's all I am doing, Judge.

The Court: And I am not going to permit him to go into the contents of any of this.

Mr. Giampietro: Your Honor, may I show a con-
189 tinuing objection to this line of questioning?

The Court: Yes, of course. Of course you may.

Mr. Giampietro: Thank you.

The Witness: Now, may I answer that question?

The Court: Yes.

By The Witness: A. F.B.I. Director J. Edgar Hoover was writing about it, the Senate Internal Security Subcommittee was having hearings on it, Law and Order Magazine was writing about it. It was discussed at some length and regularly on the floor of the House of Representatives and in the United States Senate.

By Mr. Boyle: Q. Thank you.

Mr. Stanley, I show you Defendant's Group Exhibit E-1 through '9 for identification, and ask you to look at them, please.

Mr. Giampietro: May I see those after you—

The Court: Do you have copies for counsel so that he can look at them?

190 Mr. Boyle: No.

The Court: Well, I assume that your witness has seen these before.

Mr. Boyle: Yes.

The Court: Now, what is your question?

By Mr. Boyle: Q. My question is, whether this group of exhibits that I gave you reflect the publication of this issue as you have just testified to?

Mr. Giampietro: I object to that, your Honor. There has been no proper foundation for this question at this point.

Mr. Boyle: Judge, he testified that there were such publications and I asked if they were the ones.

Mr. Giampietro: First of all, we don't know where he got them or where they came from, and I haven't even seen them yet.

The Court: You may take a look at them.

Are you asking leave to admit these in evidence?

191 Mr. Boyle: No, no, Judge.

I will withdraw the question.

The Court: All right. Withdraw the question.

Mr. Boyle: All right.

By Mr. Boyle: Q. Will you take each of these exhibits, if you please, sir, identify them for us, tell us when and where you got them, and identify them by number.

Tell us what they are, when you got them.

A. This first one is—

Q. Without going into the contents, just tell us—

A. Yes. This is an article from Reader's Digest, '65, or later than '65, probably '66; it is a part of our, it was a part of our general file on harrassment of police.

Q. All right. Proceed to the next one. Identify it by number.

A. Yes. This is No. E-5 and it is a clipping from the Deserate News; that's a newspaper in Salt Lake City. It is a daily there. November 23, 1961.

Q. When did you see it first?

192 A. Oh, I imagine that I saw it sometime probably when it first came in and had it filed.

Q. Where did you see it?

A. In our files. Similar—

The Court: Were these documents taken from your files?

The Witness: They were taken from our file, yes, sir; some of them were, some of them were obtained—

By Mr. Boyle: Q. Proceed to the next one. Identify it, please, by number.

A. This is No. E-4, a clipping from the Pittsburgh Press of Sunday, March 20, 1966. It is a U.P.I. report out of Washington. I deals with—oh, you don't want that?

Q. No, sir, I do not.

The next document; identify it, tell us when you saw it, please?

A. This is a document, the Congressional Record, April 19, 1967.

Q. May I call your attention, please, to the Appendix, Page 1094—excuse me; Page 1904.

Is that what you are talking about?

193 A. Yes, that is—

Mr. Giampietro: Your Honor, I object. There is no question pending at this time.

The Court: Well, what is that—what is that Appendix, is that your question?

Mr. Boyle: My question—I have asked him to identify this and when he saw it.

The Court: Well, ask the question.

By Mr. Boyle: Q. When did you see it, sir?

A. Probably within three days after it came out.

Q. What date would that have been?

A. It is dated April 19, 1967.

Q. All right. Proceed to the next one. Tell us the nature of the document, when you saw it.

A. This document is an annual report of the Committee on Unamerican Activities of the House of Representatives of the United States.

Q. Where did you get it? Where did you see it?

A. It is dated 1968; I probably saw it in, oh,

194 within, within a month of the time that it was out.

Q. Where did you see it?

A. We—we have on order—we have orders in for all such documents from the House and Senate Committees.

Q. In your office in Belmont?

A. In my office in Belmont, yes.

Q. And it was in that same file, is that correct?

A. It was in our general files.

Q. Thank you, sir. The next one, by Exhibit No., please.

A. This is Exhibit E-8. This is a hearing called the "Communist Plot Against the Free World Police" before the Subcommittee to investigate the Administration of internal security—of the Internal Security Act and the internal security laws before the Judiciary Committee of the United States Senate.

Q. When did you first see that?

A. Shortly after—shortly after it came out, sometime in, oh, sometime in late 1961.

Q. And where did you see it?

A. In my offices in Belmont.

195 Q. Thank you, sir.

Are there anymore?

A. Yes, there is E-9 and this is a Congressional Record for September 24, 1965, and it contains a report by the Director of the Federal Bureau of Investigation, J. Edgar Hoover, from U. S. News and World Report of September 27, 1965.

Q. In the same general area, the same general issue, Communist conspiracy to harrass the police?

A. Yes, sir, that is correct. It is—

Q. That's all, sir.

A. All right.

Mr. Boyle: At this time, your Honor, I will offer these into evidence on the issue of whether there was a public issue dealing with a Communist conspiracy to harrass the police at the time of the publication of this article.

The Court: We will discuss this matter out of the presence of the Jury sometime later where counsel may make his objections.

Mr. Boyle: Of course. Would you like to look at them now?

196 The Court: He may look at them. Probably he can take care of that during the noon hour.

Mr. Giampietro: Thank you.

The Court: They are admitted, not on the contents but simply on the basis that these were documents in the possession of—I understand that your offer is that—

Mr. Boyle: What's that, sir?

The Court: Your offer is that these were documents in the possession or that had come to the attention of the witness prior to the publication of the alleged libel in this case, is this what you are stating?

Mr. Boyle: Exactly; on the issue of whether there was a public issue at this time of this conspiracy.

The Court: They are not directed against the Defendant in any way—

Mr. Boyle: Not at all, sir.

The Court: Simply showing what facts had come

197 to the attention of this witness prior to the publication of the alleged libel.

I am simply finding out for you what the offer consists of, and so—

Mr. Giampietro: I understand that, your Honor.

The Court: All right.

Mr. Giampietro: You misspoke, I believe, your Honor. You said "not directed toward the Defendant," and I think that you mean not directed toward the Plaintiff.

The Court: Oh, I certainly did misspeak myself.

Mr. Boyle: I am trying to determine the existence of a public issue and the state of his mind before publication.

The Court: Yes. All right. I understand what the purpose is. So, all right.

Mr. Boyle: All right, sir.

198 (Whereupon, the documents previously marked for identification as Defendant's Exhibits E-1 through E-9, both inclusive, were thereupon received in evidence.)

By Mr. Boyle: Q. Mr. Stanley, I believe that in your earlier testimony you stated that when you got the summons in this case you thereafter tried to ascertain the facts with more particularity and you talked with Mr. Stang about it, is that right?

A. That is correct.

Q. Did you do anything else to attempt to ascertain the truth or falsity of that article?

A. I did.

Mr. Giampietro: Your Honor, I object at this time to anything that was done after the publication of the article. It is entirely irrelevant to these proceedings.

The Court: Well, I don't understand the purpose of the question.

Mr. Boyle: Well, your Honor, this—

199 The Court: As to what he may have done after the libel was published.

Mr. Boyle: Right. This is done in order to find out from this witness whether he was able to establish the truth of certain portions of the article.

The Court: Well, you may ask him as to what he did in that connection but as to specific matters

that he can testify to as from his personal—he can testify as to his personal knowledge, but—

Mr. Boyle: That's what I am doing.

The Court: Well, all right.

By Mr. Boyle: Q. All right, sir. Did you do anything at all other than to talk to Mr. Stang to ascertain of your personal knowledge whether the allegations in this article relating to this Defendant were true or false?

A. I went immediately—I did.

The Court: Relating to this—

Mr. Boyle: Right, sir.

The Court: You are getting into my trouble.

200 By the Witness: A. I did.

By Mr. Boyle: Q. What did you do?

The Court: If you two gentlemen would reverse yourselves at the counsel table, I wouldn't have this problem.

Mr. Giampietro: Your Honor, I would object to this until he tells us the specific time that he is talking about.

The Court: Well, perhaps that's his next question.

When did you do it?

By Mr. Boyle: Q. What did you do? Where did you do it? At what time?

Please explain it. What did you do?

A. As soon as I—

Q. Where did you do it and at what time?

A. As soon as I became aware—

Q. When was that?

A. Oh, I believe it was sometime in June of last year.

Q. All right.

201 A. I went—I went immediately to the Government documents, to our documents from the House Committee on Unamerican Activities and the Senate Internal Security Subcommittee, to determine whether or not—to confirm in my own mind that what Mr. Stang had said was absolutely accurate.

Q. Well, where were these documents at that time?

Mr. Giampietro: Your Honor, I object—

The Court: Wait a minute.

Mr. Giampietro: I object to this. First of all, it doesn't show that he has any first-hand knowledge of anything. He is referring to something else.

Secondly, again, I would submit that it is irrelevant to this proceeding.

The Court: When Mr. Gertz finishes, I will rule on the matter.

(Brief interruption.)

The Court: Unless you are prepared to offer into evidence—I mean, something more than just the
202 uncorroborated testimony of the witness as to what he may have done or what he may have found in some document, I am going to sustain the objections. There is no question about that.

Mr. Boyle: I would like to make an offer of proof.

The Court: You may make your offier of proof some time later.

Mr. Boyle: Thank you, your Honor.

Mr. Giampietro: Your Honor, may I move that the previous testimony on this subject be stricken?

The Court: Well, he really hasn't gone into—he really hasn't said anything yet except that he went

to certain—that last question may be stricken, if that's what you would like to have me strike.

Mr. Giampietro: That is correct, your Honor.

The Court: All right.

Mr. Boyle: All right, your Honor. Then that's the end of my direct examination.

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41 Colloquy re Jury Instructions: • • •.

The Court: Maybe a short stipulation as to the fact that there was at least a discussion, a publication, I mean, a public discussion at the time in question of the issue as to whether or not there was a Communist conspiracy directed against the police.

Mr. Gertz: The John Birchers did, but not the Congressional—

Mr. Boyle: Oh, now, please, this is the kind of subjectivity that I would like to be protected against for the balance of this trial, Mr. Gertz.

The Court: All right, all right.

Mr. Giampietro: Your Honor, may I ask one question? There are a couple of things that I am not clear on, at least as to your holding.

There were two ways in which this public issue area may come into being. One is under the general old rules of libel that have developed about fair comment on public issues, that's one thing, and it is the regular general rules of libel.

42 The second thing is the New York Times Rule, and the following rules.

The Court: Well, it also has something to do with the whole question of malice, doesn't it?

Mr. Giampietro: Well, here is—that's exactly my point, though.

As I understand the New York Times and the following cases, they deal with public figures; people who are in the public eye. Under those rules—and I think that this is shown by the cases which I cited in my trial memo—in order to come within New York Times, you must speak of a person as a public figure and your comments must be directed to him in that capacity, as a public figure, on that, on any particular issue in which he may have injected himself.

As I read New York Times and the following cases—

The Court: Well, you are arguing now the question as to "public figure".

Mr. Giampietro: Well, no, I am trying to make a differentiation, your Honor, as to the kinds of rules
43 of law that are going to be applied to this, because, under the New York Times, the definition of "malice" is very, very strictly confined.

Under the general rules of libel regarding public issues, it is much, much easier to prove malice and many other things are admissible to show malice on their part, so I am trying to find out—

The Court: Well, you are trying to find out what I am going to rule on the question of "public figure" ——and if you are trying to do that, why—

Mr. Giampietro: Well, yes. Right.

Mr. Boyle: Yes.

The Court: Well, if you are trying to find that out, why, you want to smoke me out right now.

Mr. Boyle: I think that the—

The Court: I will hear your argument—do you necessarily want him to take it down or do you just want to make it informally?

• • •

47 Mr. Boyle: There was an objection to it.

The Court: You asked whom?

Mr. Boyle: Mr. Gertz.

Mr. Giampietro: I don't recall that.

The Court: Let me see the document.

Mr. Boyle: (Handing document.)

All right. Well, here, what I want to do is this, what I would do—I asked him if there was—oh, gosh, I forgot. I don't remember. I thought that I did, but—

The Court: Well, this is not in.

Mr. Boyle: No, it is not in.

I will, without—but this is what we are talking about. I have identified it as Plaintiff's—a Defendant's Exhibit, Defendant's Group Exhibit—Defendant's Group Exhibit D-1 through '9, which were the photostated copies of the Chicago Daily News and the Chicago Sun-Times, relating to the publicity given to Nuccio.

The Court: Well, will you stipulate that the Nuccio trial was widely publicized in the Chicago press?

48 Mr. Boyle: Well, if you could just—

The Court: I am asking him.

Mr. Giampietro: There was some publicity.

Mr. Boyle: Well, if counsel would go this, then, your Honor—you remember, I subpoenaed the Sun-Times, solely to show that there was publicity in the Sun-Times. He claimed a privilege. I said that I just wanted to have somebody here to give me the foundational proof to rule on these matters.

Mr. Gertz said that if it was just a question of the form of them and were they true copies, that he agreed to stipulate as to that.

Mr. Giampietro: Oh, yes. No question about that.

Mr. Boyle: All right. Well, then, I would offer them at this time to his Honor, in evidence, on the issue of whether the publicity given to the Nuccio trial created yet a second issue.

Now, if his objection is raised to the substance of that tender, that's one thing, but the form is another, and I say that he stipulated with me about the form.

49 Mr. Giampietro: Right. We did stipulate about the form, there is no question about that.

Mr. Boyle: Yes.

Mr. Giampietro: No question about that.

Mr. Boyle: Yes, but I am offering, then, as Defendant's Group Exhibit D-1 through D-9 into evidence as being, as to being the photostats of the newspaper publicity given to the Nuccio trial in Chicago by the Chicago—by the Chicago newspapers.

The Court: That's your entire foundation?

Mr. Boyle: As probative—yes,—as probative, as probative of the issue as to whether the trial itself was yet another public issue.

Mr. Giampietro: I have a couple of objections to that.

The Court: Yes.

Mr. Giampietro: First, first of all—

The Court: You may make them.

Mr. Giampietro: First of all, there is no showing that Mr. Stanley, or anybody at American Opinion,

knew of those articles at the time that they commissioned or wrote their article, so there is no evidence
50 that they knew that there was any such public issue at the time, and that's what really counts.

The Court: All right. Go ahead.

Mr. Giampietro: Secondly, there is no showing in there that any of these articles dealt with Mr. Gertz, and that goes to the foundation—

The Court: Well, I will sustain the objection to the exhibits. I don't think that under any circumstances in the case do they have any probative value at all.

Mr. Boyle: Well, I am going to ask that I be given an opportunity to—well, I have made my offer.

The Court: You have made your offer.

Mr. Boyle: That is right. Thank you.

The Court: All right. Now, you had better go ahead and make your argument to me as to why you think that this evidence shows that he is a public figure.

You found out—and the record will show this—that at the time of the voir dire examination there was not, as I recall, a single member of the panel who had ever heard of Elmer Gertz; at least I got no response.

51 Mr. Gertz: That's right.

Mr. Giampietro: That's right.

The Court: Not any response from the panel. That's number one.

Number two you have shown that he has been active in legal circles. You have shown that he has done some writing. You have shown that he has appeared on some television stations, and so has one

of his witnesses, Frank Greenberg who testified here.

Now, is it your contention that when a lawyer becomes prominent and gets into—and becomes engaged in some type of other activities as well as his law practice, his law business, that he becomes a public figure to the point where he can be used in a situation like this and find himself helpless to defend himself against libelous material on the basis that he is privileged? I mean under the First Amendment?

Mr. Boyle: It is my contention, your Honor, that the public—that the philosophy behind extending the language of the ruling of the Sullivan versus Times case to a public figure was basically the access of the
52 public figure to the mass media of the information in order that he might respond to any kind of remarks.

The Court: Do you think that Mr. Gertz should have taken the podium and said "I am not a Communist"?

Mr. Boyle: I think that Mr. Gertz certainly would have had, and continues to have, the public eye for that purpose and that his comments as a public person have, in the past, covered a great range of subjects and I think that he would have at his disposal a continuing availability, an ear to the public to give the public his own views on any subject, including the most vituperative argument against the John Birch Society, or anything else, because he has had this access, and, with that philosophy, I would say that if—if a lawyer had achieved notoriety by being a great golfer and that's all, then I would say, now,

there is a real question. But when this kind of a lawyer, whose great prominence arose dually, both through his notoriety that was achieved by his handling of prominent cases and by his altogether different role as an author, as a newspaper writer, his —he really has an identity that makes him, I think,
53 a public figure in the fullest sense.

The thing that we have at issue is, are we to take the lawyer and say that he can be editorializing, he can be writing, he can be communicating with the masses, but, because he is a lawyer, the courts are going to call him the sacred cow of the times, the Times Doctrine and say that when he gets into that courtroom and has a case going, no one can make any comments about him at all in any political area, even if the trial itself is fought—I mean, whether it is thought, rightfully or wrongfully, to be part of a political area.

Further, it is my contention—and I don't know whether there is any law on it or not, but I would urge it, that a lawyer, when he starts representing a client so as to initiate a lawsuit, becomes a public official in his capacity as officer of the court, and one looks and sees that people like deputy sheriffs in their functions have been held to be public officials, and I think that there is nothing whatsoever wrong with the notion that an officer of the judicial branch of the government, when he is functioning as such, would be a public official within the purview of the
54 Times case, provided that there was a sufficient public issue in what he was doing.

Now, in this particular case the record shows that

Mr. Gertz filed a lawsuit against an officer, right at the time when the officer was employed—was embroiled in criminal defense of himself, and, further, that as a lawyer, as a lawyer and as a continuing officer of the court, under the discipline of the Supreme Court of this state, he appeared at an inquest and functioned as an officer of the court, so that in that regard I think—I think that it is not at all difficult to say that as to the issue which, by filing this suit, he participated in, as to the public issue of the troubles and tribulations of this policeman, he was a public official, not merely a public figure, and, by either role, your Honor, I say there were two public issues; the trial of Nuccio himself, the public issue of whether this, whether this particular case was written—whether this particular case was within the public issue of a Communist conspiracy to harass these people, and also that Mr. Gertz existed in a dual capacity, both as a public officer, by virtue of
55 being an officer of the court, and as a public figure by virtue of his totally disassociated activities of author, et cetera.

Now, in addition to that, when one looks at the evidence, the evidence simply shows that the reputation of Mr. Stang was such that the editor relied upon him.

The record further shows that there was no knowledge of Mr. Gertz—

The Court: Well, I understand that.

Mr. Boyle: All right. So that I say that if Mr. Gertz is held to be either a public official or a public figure, and if Mr. Gertz is held to have been asso-

ciated with these two issues, then Mr. Gertz is bound by the rule of the Times case and he must prove actual malice.

My contention is that there was no publication with knowledge of the probable falsity of the promulgated matter with the strong degree of knowledge required to overcome this privilege, and I don't think that there is an issue that is submittable to the jury on any one of those points.

The Court: All right. I have no problem; if he
56 is considered to be a public figure, there is a directed verdict. There is no question about that. I mean, there is no issue left. I mean, if he is a "public figure". I mean, and that there has been no malice shown.

Mr. Gertz: With the distribution of the article for a year afterward—

Mr. Giampietro: Plus the fact that they didn't even talk to Nuccio's attorney. I think that's enough.

The Court: I can say now, without any question, and it will appear of record in the case, that on the basis of the evidence that I have heard, that if I—if I should hold, or some other court should hold, that he is a public figure, that so far as the rest of the evidence is concerned, I would direct a verdict on the question of malice, on the evidence that I have heard. I wouldn't even submit it to the jury.

Mr. Boyle: Would you do the same if he were a public official, your Honor, under the alternate theory?

The Court: Why, of course, but I don't—but you haven't convinced me of either one, and so—I will hear from you, Counsel.

57 Mr. Giampietro: All right. First of all, it has been specifically held in the Harkaway case—

The Court: I have read these cases and I know your memorandum. Do you want to add anything to it?

Mr. Giampietro: Well, yes, I would like to add just a couple of things.

The Court: All right.

Mr. Giampietro: First of all, it has been specifically held that an attorney is not, in and of himself, in and of itself, a "public official".

The Court: I understand that.

Mr. Giampietro: All right.

First of all, in response to Mr. Boyle's statement there was no trial involved in which Mr. Gertz participated.

The Court: I know that.

Mr. Giampietro: So he can't say that there was a public issue on a trial because Mr. Gertz wasn't involved in that at all. He didn't speak out in any way on the matter. He did not thrust himself into this issue. He made no public statements. Not of any kind. He wasn't available—did not open himself up
58 to return comment, not available, therefore, to opening himself up to return comment on any of this, not because of anything he had said.

As to any notoriety or knowledge as to articles and books beforehand which he may have written, this article here about which we are suing does not refer to him in that capacity, and, of course, the best evidence of that is the fact that these guys at American Opinion never heard of him. They couldn't have been talking about him as a public official because

they didn't know who he was. Not anymore than they knew about me or Mr. Boyle. Or anybody else out on the street.

I think that those cases specifically hold he must have spoken out in his public, official capacity.

The Court: I am not going to direct a verdict. I am going to submit the case to the jury on the basis—on the basis that this is a simple libel action in which a lawyer is involved, and the question will be to give them proper instructions under that theory of the case. If I am wrong, it can be taken care of, either by myself or by some other court at a later time, if I am wrong.

59 If I am wrong, I have already stated that my alternative finding would be that there isn't enough evidence to submit to a jury.

Mr. Giampietro: Your Honor, may I, on that last point, may I ask you a question: How does your feeling differ now between your decision to deny the motions for summary judgment? Isn't the evidence in the same state as it was then regarding the issue of malice?

Mr. Boyle: Not at all; there is an important distinction.

His Honor coupled the lack of knowledge with a word in an affidavit which modified—

The Court: That's true.

Mr. Boyle: —the reputation of this man, and there is no evidence whatsoever of that nature in this proceeding.

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Mr. Boyle: May it please the Court, there is one other thing that I have to do for the record and that

is to make an offer of proof with reference to—with
61 reference to some stuff—I will do it as quickly as possible.

The Court: Well, do it right now.

Mr. Boyle: All right. Let the record show that if Mr. Allen Stang were allowed to testify he would testify as follows: That after he—

Mr. Gertz: Mr. Stang isn't here.

Mr. Giampietro: Stanley.

Mr. Boyle: Well, Mr. Stanley, I mean.

That Mr. Stanley would testify, as follows: That after his receipt of information of summons in this lawsuit, he went in an effort to check the accuracy or lack of accuracy in the article itself, and, in so doing, he inquired of certain books and publications in his office, they being Exhibits—Defendant's Exhibit F for identification, known as Appendix 9 of the Un-American Propaganda Activities, which is an official text printed in the Government Printing Office, bearing the date of 1944, and that he did this in the month of June 1969.

Further, this exhibit is identified as "Special Committee on Un-American Activities, House of Representatives, 78th Congress, Second Session," and that in making inquiry of Index 9—

62 The Court: You don't have to go into any great detail on this. It is the substance of your showing—

Mr. Boyle: All right. Very well, your Honor.

The Court: I don't care what the exhibit shows.

Mr. Boyle: All right, your Honor, but—very well, your Honor.

But he would show by these tendered exhibits—as I understand the law, if I don't make an offer in terms of—

The Court: You may make an offer. Go ahead.

Mr. Boyle: In terms of the propriety of the proof, that it is the subject of—

The Court: Yes. Go ahead.

Mr. Boyle: And in inquiring of the book, he found on Page 1902 thereof the name of Elmer Gertz, referring to Page 302 of the text.

The Court: All I can say right now, that whatever it shows there, it won't be admissible here, but go ahead.

63 Mr. Boyle: On Page 302 of the text he found the name of Elmer Gertz listed with the following words: "Guest lecturer, author of 'The People Versus The Chicago Tribune,' 'Frank Harris, a Study in Black and White,' 'The Epic of the Prairie State,' and other writings, formerly branch circulation manager of the Chicago Evening American, faculty member of the Jewish People's Institute, Director of Public Relations of Illinois Police Association, founder of the Civil War Round Table of the Chicago Chapter, and Chairman of the Committee"—

The Court: And other facts shown on that page.

Mr. Boyle: And other facts shown on that page, including the lecture—including the "Abraham Lincoln Association, practicing attorney."

Further, he would testify that—

Mr. Giampietro: May the record show our objection?

The Court: Yes, yes; the record may show your objection. I sustain the objection.

Mr. Boyle: Further, the witness would testify that another document that he inquired of, which is
64 marked Defendant's Exhibit H for identification, is an official publication sealed under the Clerk of the House of Representatives' Seal, bearing the date of September 21, 1970;

That he saw this article in the month of June 1969 and that the coverpage on the article read, as follows: "Report on the National Lawyers Association" —"National Lawyers Guild, The Legal Bulwark of the Communist Party," bearing the date September 17, 1950.

Further, he would testify—

Mr. Gertz: Objection.

Mr. Giampietro: Again I would object.

Mr. Boyle: Further he would testify—

The Court: Sustained.

Mr. Boyle: Further he would testify that he made an additional inquiry in order to ascertain the truth or falsity of some of the allegations, particularly the allegation relating to Communist Front Organizations in the libel, and he inquired of another book in the library of his office in Belmont, Massachusetts, in the month of June 1969, and I refer to Defendant's Exhibit G for identification, which is entitled "Guide To Subversive Organizations and Publications and
65 Indexes," revised and published December 31, 1961, to supersede Guide published on January 7, 1957, which is—and under the Seal of the Clerk of the United States House of Representatives as an official publication of the Committee on Un-American Activities, U. S. House of Representatives, and the matters therein relating to the listing of the Abraham Lincoln

Association and the National Lawyers Guild, as having been cited by the Attorney General of the United States as a Communist Front Organization.

Mr. Giampietro: I object.

Mr. Boyle: All right.

The Court: That's it?

Mr. Boyle: No. Almost. Wait a minute.

(Brief interruption.)

Mr. Boyle: No; that's all.

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68 The Court: All right. Let's take up Plaintiff's tendered instructions first. That may eliminate some of yours on the basis that they are already given.

Now, I have looked at—does he have copies?

Mr. Gertz: Yes.

Mr. Giampietro: Yes.

The Court: All right. Just take a quick look at these. Some of them are—you won't have any problems about some of them.

Number one is given; it is simply a stock instruction.

So is number two. Number three is stock. Number four will be given.

Mr. Boyle: Oh, are you on his?

The Court: Yes. Number one and two will be given, they are stock. Number three is stock. Number four you wouldn't want yourself.

69 Number four will be given, saying that I'd have to—

Mr. Boyle: No objection.

The Court: Now, number five, I assume, deals with the author?

Mr. Giampietro: Yes.

Mr. Boyle: Oh, now, that—I object very strenuously to that.

The Court: You don't have to be too strenuous because I think that your objection is well taken. He is no more in the control of—in fact, he is a free lance writer, he is equally accessible to both of you. He's not an agent. I am going to refuse it. I am going to refuse five.

Mr. Giampietro: All right. We will show our objection.

The Court: Yes.

Number six, given, and number seven, given.

Number eight, that's stock. Given.

Number nine simply says on account of alleged libels—

Mr. Boyle: Yes, it should be.

70 The Court: Well, I don't know put it "alleged"; what's the difference.

Mr. Boyle: Well—

Mr. Gertz: So that's given?

The Court: That's given.

Mr. Boyle: "Alleged"; okay.

The Court: Now, I have got a question mark on number ten. Actually, the wording of the libel is "Leninist" rather than—

Mr. Boyle: That is right.

The Court: Rather than "Communist."

I can't find the word "Communist"—

Mr. Giampietro: Yes, it is there.

The Court: Well, if you can find it, if you can point it out, you are doing better than I can.

Mr. Boyle: Well, no, they did not—

Mr. Gertz: "Marxist."

Mr. Giampietro: "Communist-fronter."

Mr. Boyle: They—no.

Mr. Gertz: "Marxist."

The Court: Just a minute. Wait a minute. There is a "Leninist" which I quote as such. And there may be a "Communist-fronter."

71 Mr. Boyle: There is a "Communist-fronter". There is a "Marxist", and there is a "Revolutionary". There is a "Leninist."

The Court: Well, I am only going to say that it is libelous "per se" to call him a "Leninist," I mean—

Mr. Gertz: And a "Marxist".

The Court: Well, "Marxist" isn't libelous per se. At least I haven't—does it say that you are a "Marxist"?

Where does it say that? It says that you are connected with a Marxist-something, but—

Mr. Gertz: "Communist organization . . . Leninist . . . Communist-fronter . . . Leninist . . . Communist-fronter."

What about the word "Red"?

Mr. Giampietro: Yes.

Mr. Boyle: ". . . of Red Guild . . ."

They didn't call you "Red" in there, they said that the "Guild" was "Red" and you were of it.

The Court: I am going to insert "Leninist".

Mr. Boyle: "Leninist" and "Communist-fronter," I think.

72 The Court: "Leninist" and "Communist-fronter."

Mr. Boyle: All right.

", . . called Plaintiff a 'Leninist' "—

Mr. Gertz: What about something to do with—

The Court: Well, that's enough. What's the purpose of putting something else in? I mean, if that's in there, what's the purpose of putting something else in?

Well, number ten I assume is given over your objection?

Mr. Boyle: Yes, sir.

The Court: All right. I will show your objection.

Number eleven, I changed the word "actual" to "pecuniary".

Mr. Giampietro: Any objection?

The Court: Is there any objection, Counsel?

Is there any objection to changing that?

Mr. Giampietro: No.

The Court: All right. Any objection to changing nine?

73 Mr. Giampietro: No.

The Court: I assume that you object to number eleven also?

Mr. Boyle: Yes, Judge. I do.

The Court: All right. I will show the objection. It is overruled.

Now, do you have an instruction on twelve, on mental suffering and injury to reputation?

Mr. Giampietro: That's—well, that's the next one.

The Court: Yes. Number twelve. I have got number twelve. ". . . the publication complained of . . ." —is that your thirteen?

Mr. Boyle: It is twelve.

The Court: Twelve?

Mr. Gertz: Oh, what do you mean by "mental suffering"?

The Court: What I am saying—what I am asking is, do you have an instruction that says that mental suffering and injury to reptuation as a result need not be proved but may be inferred from the nature of the injury?

74 I am asking you if you have any authority to justify giving that instruction?

Mr.. Giampietro: Well, that's the general law—

The Court: That's the point that I want.

Mr. Giampietro: It is found in—wait a minute.

The Court: I think that you are correct but I want to—I would like to know what authority you base it on. Ordinarily "mental suffering" doesn't count, but maybe it does in this type of a case.

Mr. Boyle: Well, if it please the Court, may I show my objection to that? To the last one?

The Court: I will certainly show your objection to it.

Mr. Boyle: Yes.

The Court: I say,—do you say that it is not I.L.P.?

Mr. Giampietro: No; it is in Illinois Law and Practice; it is not in I.P.I. It is not in I.P.I.

The Court: Well, I suppose that the jury—I sup-

75 pose that the injury to the reputation certainly can be inferred from it; I mean, it is not just—if it is a libel per se it has to be true. And I would assume "mental suffering" would have to be inferred if it is a libel per se.

Mr. Gertz: Your Honor, there are cases on that.

The Court: Well, there must be.

I will put number twelve to one side. You can probably come up with a case before we instruct, but I

expect to give it, unless somebody gives me, I mean, unless somebody can find the law—I expect you to find something on it.

Mr. Gertz: We will find something on it.

Mr. Giampietro: Yes.

The Court: All right. Number thirteen. It seems to me that subject to Number—six—subject to Number six, it is a good instruction, but I assume that you object to all of these instructions being given?

Mr. Boyle: Yes, I do.

76 The Court: Number six is the only thing that I have a question mark on, on "mental suffering".

Mr. Boyle: There is no evidence in the record so it would have to be there by virtue of a presumption.

The Court: That's right.

Mr. Boyle: And I object to it.

The Court: All right. Number fourteen will be given as to the burden—as to the essential elements, and I assume that you object to that?

Mr. Boyle: Yes, I do.

The Court: That will be given.

Now, number fifteen, you can read that here.

(Brief interruption.)

Mr. Boyle: Well, I think that this is a perfunctory instruction; I mean, a directive instruction, because, because it is not harmonized with the concept that reliance on someone else can be taken with respect to, with respect to punitive damages, and this instruction—

The Court: We have not reached that point yet.

77 Mr. Boyle: I know, but this seems to state that they don't have to give any weight or any consideration at all to the fact of relying upon another, and, for those reasons, I object to it.

The Court: All right, you object.

Mr. Giampietro: I think that it is clear, that the law is clear that re-publishing a libel and repeating it, repeating a libel, from someone else, is not a defense.

The Court: Well, I think that that's true; I mean, if it is a libel to begin with and someone else publishes it without, without any effort to find out whether it is true or false—now, there may be some mitigation but it is not a complete defense. Fifteen will be given.

Mr. Gertz: Is that with—

The Court: So far as the verdict is concerned, I will give those, so, in effect, you have them now.

So, let's take up—

Mr. Giampietro: Your Honor, inadvertently we left out an instruction on punitive damages.

78 The Court: I didn't think that that was inadvertent, I thought that you were making my life much easier.

Mr. Gertz: I reminded him of it.

Mr. Giampietro: Yes. This would be the—

The Court: I thought that my work was all done.

Mr. Gertz: It is a simple one.

Mr. Giampietro: It is just a very short one. "In assessing damages, you may also award Plaintiff such amount as will punish Defendant for publishing the untrue, defamatory statements"—". . . concerning Plaintiff."

The Court: If you find what?

Mr. Gertz: Just if it is untrue.

The Court: Now wait—just if it is untrue?

Mr. Boyle: Oh, I think that malice is required.

The Court: Don't you have to—

Mr. Boyle: I think that malice has to be hitched to it.

The Court: Is that—that's your single instruction, is it?

79 Mr. Giampietro: Malice is—malice is presumed in libel per se and punitive damages flow from that, if the jury so desires.

The Court: You are satisfied that you don't have to prove any—I mean, that malice is—

Mr. Gertz: That's right, any actual malice.

(Brief interruption.)

Mr. Giampietro: I can provide authority.

The Court: All right. Provide that authority and it will be given.

Mr. Boyle: If it please the Court, my objection to that instruction?

The Court: Yes. Overruled.

Mr. Boyle: You are overruling my objection?

The Court: Yes. Overruled.

(Brief interruption.)

The Court: All right. Now, let's take up Plaintiff's—there are a number of these that you will want to withdraw.

Mr. Boyle: Oh, Judge, the only one that I still am left with, I think—

80 The Court: All right. You withdraw all but what?

Mr. Boyle: Well, I think that they are all—

The Court: They are all covered?

Mr. Boyle: Oh, I think so, but they are all stock except the last one which I tender, which is my I. The letter "I" instruction.

The Court: I assume that you object to that?

Mr. Gertz: Yes.

Mr. Giampietro: Yes.

Mr. Gertz: Because—

The Court: Well, I will be refused.

Mr. Giampietro: Is this refused?

Mr. Boyle: Yes.

The Court: Yes.

Mr. Giampietro: All right.

Mr. Boyle: Refused. Then we have one that we were reserving, I think.

Mr. Gertz: Really, one and a part of another.

Mr. Boyle: Would you provide me with a copy of that, Wayne, the one that you just—

81 Mr. Giampietro: Yes. Sure.

Mr. Gertz: Your Honor, could we impose upon your secretary to type—

The Court: Oh, yes, she will type it for you, if you will just give it to her.

Mr. Gertz: Yes. This is a set without identification numbers.

The Court: I don't care. I don't care about those, you keep it.

Mr. Gertz: Because in the State Courts—

The Court: Well, I know, but the jury doesn't get that. They don't get them here.

Mr. Boyle: Do they get the exhibits here?

The Court: They get the exhibits but not the instructions.

(Brief interruption.)

Mr. Boyle: Now, which ones were we reserving ruling on?

The Court: Well, we reserved on twelve; Plaintiff's Exhibit 5, the one we pulled out. Thirteen. Twelve and thirteen.

Mr. Boyle: All right.

The Court: Twelve and thirteen.

Mr. Gertz: And item five of—

82 The Court: Item five of thirteen. It is twelve and thirteen.

Mr. Boyle: Okay.

Mr. Gertz: Now, dig that up.

The Court: I particularly want the law on the proposition that malice is presumed and you don't even have to give an instruction on it, on wilful and wanton.

(Discussion off the record.)

The Court: How much time do you want to argue?

Mr. Gertz: About forty-five minutes?

The Court: Forty-five minutes is fine.

Mr. Gertz: How do you want to divide that up, half an hour and fifteen minutes?

The Court: Thirty and fifteen? That's agreeable.

Mr. Gertz: Thirty and fifteen.

Mr. Boyle: I will ask for half an hour. I probably won't take more than fifteen minutes, but it's always nice to have.

(Discussion off the record.)

Mr. Boyle: Now, here is this other part. These

83 are those exhibits all cut out so that there is nothing—

The Court: I understand.

Mr. Gertz: You are admitting those, over our objection?

The Court: Yes. That's right.

Mr. Boyle: Right. And these are the Group 9.

Mr. Gertz: Those are clippings going back to 1945.

Mr. Boyle: Now, these aren't for the jury; these were for his Honor to deliberate upon when he decided—

The Court: They may be admitted for that purpose, not to go to the jury.

Mr. Boyle: That's exactly right. Exactly right. So I will just hang onto them. They aren't going anywhere.

(Interruption.)

Mr. Gertz: We have that, your Honor.

The Court: What's it say?

Mr. Gertz: It says that exemplary damages may be awarded on the basis of implied—

The Court: All right.

84 Mr. Giampietro: It is quoted in that Van Norman case.

• • •

219 CLOSING ARGUMENT,
MR. BOYLE, ATTORNEY FOR DEFENDANT

• • •

He didn't call them up. He didn't write them a letter. He didn't advise them about anything.

I think that you are entitled, and he is entitled to the presumption, that Stang wasn't right in all respects in this case. I don't think that there are

any two ways about it. As I stand here today, I can speak on behalf of my client and say that we don't think that Elmer Gertz is a Communist. We do think that we are a counterforce, my client is, against, not just against witches but something that is real, something that is out there now and our Editor spoke, or this magazine spoke, with a lot of hair on its chest, and we are content to let the kind of Government that we are trying to save be perpetuated by giving you the control over that voice. . . .

• • •

222 HEARING ON MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT

The Clerk: 69 C 1288, Gertz versus Welch; ruling on motions.

Mr. Gertz: Good morning, your Honor.

The Court: Good morning.

Mr. Boyle: Good morning, Judge.

The Court: Good morning.

I have ready to give to you gentlemen this morning a memorandum opinion disposing of the Motion for Judgment notwithstanding the verdict, or, in the alternative, for a new trial, and that will explain the reasons for doing what I am about to do; it will explain the reasons for the judgment that I have reached that I have no alternative under the law as the law now exists except to grant the Motion for Judgment notwithstanding the verdict and, in effect, vacate the verdict of the Jury awarding the Plaintiff damages in the amount of $50,000.

You gentlemen, I think, already know that I have spent some considerable time on this case already; I wrote two opinions.

223 I permitted the case to go to the Jury and I got, at least, for the benefit of the Plaintiff, the Jury's judgment about the—the Jury's judgment as to what the damages in this case reasonably should be, based on what the Jury heard and based on the instructions that I gave the Jury.

But subsequent to the trial of the case I made a more thorough investigation into the law and I am convinced in my own mind that the law as it now exists, and until the Supreme Court does something to change it, has extended the Times Rule to not only public officials, public figures, but also to matters of public interest, and all this is outlined in the opinion.

Not only is that true insofar as the Courts of Appeal, a number of Court of Appeal decisions, but, as Mr. Gertz well knows, it has also been true in the Illinois, the Supreme Court of Illinois, in Farnsworth v. the Tribune, certainly did the same thing,

224 and, by analogy to all of these cases, I don't think that I have any alternative here except to follow the law as I think that the law has been set forth in these cases.

I will make this one personal observation and then that will finish any statement that I may want to make: A Trial Judge's views as to what the law should be—I think you will agree with me—can't be substituted for what, and in this case where a member of the legal profession was involved, I think that I had some difficulty in being objective, and particu-

larly where there was a lawyer involved who was, on the face of it, at least, maligned by what proved to be a baseless charge, and while I strongly favor a free press, I also favor a press that is responsible, and I think that a responsible press should be subject to the same requirements for meeting ordinary standards of decent behavior as other citizens, and I would hope that the Supreme Court—which I understand is considering this very subject now—would arrive at that same conclusion, but with the law, as I think that it has clearly been stated in these opinions, I don't think that this verdict can stand.

Mr. Gertz: Your Honor, would there be any necessity for any bond other than a cost bond here?

The Court: No, I don't—well, I don't know.

Mr. Boyle: The Defendant would certainly waive the necessity of posting a bond—

The Court: You will waive the necessity of a bond?

Mr. Boyle: The necessity for posting a cost bond, sure.

The Court: You have got your liquidated damages and so now it is up to you to see if you can sustain it.

• • •

DEFENDANT'S EXHIBITS

EXHIBIT A

MOTION

Now comes plaintiff, ELMER GERTZ, by his attorney, WAYNE B. GIAMPIETRO, and moves for a protective order herein, and in support thereof represents unto the court as follows:

1. Plaintiff has been served with a notice of deposition in which notice it is stated that defendant intends to ask plaintiff the following question, among others:

The names, publication dates, and where they appeared of all articles and books ever written by plaintiff.

2. Plaintiff has written the following books, as listed in Who's Who in America: Frank Harris: A Study in Black and White; A Handful of Clients; Moment of Madness; The People v. Jack Ruby. In addition, he has written thousands of articles in numerous magazines and newspapers and it is impossible for him to recall all of these several thousand articles. He has kept no record of them since he began writing in his late teens. These articles have appeared in rep-

utable publications, including historical, legal, literary, encyclopedias and newspapers and other publications.

3. Said notice of deposition also states that plaintiff is to be asked to state each and every speech he has give, the place where such speech was given, and the topic thereof.

4. Plaintiff has given speeches from his boyhood continuously until the present time and it would be impossible for him to recall each and every one of these speeches, which have been given before every kind of audience, including high schools, colleges and various public and private groups. Plaintiff uses no notes for such speeches but gives them extemperaneously, and has kept no records of these speeches, and therefore has no way in which to determine the subject matter of these speeches.

5. Said notice of deposition also indicates that plaintiff is to be asked to state each and every appearance he has made on a radio and television station, the dates thereof, the name of the station and the topic of the discussion.

6. Plaintiff has been an attorney for forty years and in the course of his legal career has appeared on almost every radio and television station in the city of Chicago several times, as well as stations in Dallas, Boston, New York, New Hampshire and other places. It would be impossible for him to list or state the dates of such appearances or the subject matter discussed therein as he has kept no records of such appearances.

WHEREFORE, plaintiff prays that this court enter an order limiting the scope of the examination in these respects.

/s/ Wayne B. Giampietro
WAYNE B. GIAMPIETRO
120 S. LaSalle Street
Chicago, Illinois 60603
726-6116

EXHIBIT B

MISCELLANEOUS WRITINGS BY ELMER GERTZ

Chicago Sun and Chicago Sun-Times

I have written reviews of books and plays from the first publication of this newspaper to date. I have probably written several hundred reviews during these many years.

Chicago Daily News

During a period of time, I have written many book reviews for this publication.

Chicago Evening Post

When I was a young man, I wrote reviews for this now defunct newspaper on books.

Chicago Defender

I wrote poetry, reviews and miscellaneous articles for this publication while I was at college and at subsequent periods.

Chicago Courier

For a period of time, I wrote weekly articles in which I popularized legal problems.

The Nation

For years I wrote for this publication on politics and occasionally on other subjects, including book reviews. In recent years, I have written much less than earlier.

Chicago Jewish Forum

This is a quarterly publication for which I wrote for a period of thirty years. It is now out of existence. I had a column for a period of years dealing with civil rights and I wrote articles on a variety of subjects, including journalism, literature and history, all with a Jewish angle.

The Sentinel

This is an anglo-Jewish publication for which I have occasionally written on matters of Jewish interest.

Journal of the Illinois State Historical Society

During a period of years, I have occasionally written for this publication on historical themes, including Chicago journalims, Galena Generals, the Black Laws of Illinois, book reviews, etc.

B'nai B'rith Monthly and National Jewish Monthly

(This is the same publication under change of

name.) Occasionally during the last forty years or more, I have written articles on themes of Jewish interest.

Facts

I believe that this publication is now defunct. During a long period of time, I wrote popularizations of legal subjects.

Chicago Daily Law Bulletin

For several years I wrote book reviews and occasionally articles dealing with civil rights.

Lincoln Herald

This is a publication dealing with Lincoln and the Civil War. During a period of years, I have written articles and book reviews.

Autograph Collector's Journal and Manuscripts.

(This is the same publication under different names) During a period of years, I have written articles dealing with my collecting interests, including President Truman, Bernard Shaw, Clarence Darrow, Frank Harris, Carl Sandburg and other subjects.

Shaw Society Newsletter

For a period of years, I was President of the Shaw Society of Chicago, which had a montly publication for which I wrote articles pertaining to Shaw.

The Paper

This was a weekly publication dealing with various aspects of the arts and life in Chicago. I wrote articles almost every week for it on journalism, my reminiscences of public and literary figures, my family and many other themes.

GENERAL

From childhood on, I have written almost continuously for newspapers and magazines. I suppose that I have written thousands of articles. I am sure that nobody, including myself, has a full set of all that I wrote.

H. STUART CUNNINGHAM
CLERK
FILED
FEB - 8 1971

C 42

A 'prude' fights for sexy books

'I would defend the right of any man to be a pig,' says lawyer Elmer Gertz, battler for the freedom to read

By Lois Wille

Chicago's leading defender of man's right to read sexy books and see sexy movies says he's really just an old-fashioned prude.

Attorney Elmer Gertz, 61, a silver-haired, courtly, soft-voiced gentleman who wouldn't think of swearing.

He refuses to see "pornographic movies — unless he's preparing a case for showing them. "Personally," he says, "I have a great distaste for many of the things I've defended."

HE ONCE CAUGHT his 10-year-old son reading Frank Harris' sexually candid biography, "My Life and Loves," and promptly hid it in the basement.

"I thought the boy was a little young," Gertz says, looking embarrassed.

Months later his basement was flooded. The Harris book — a valuable first edition sent to Gertz by the author — was destroyed.

He must have thought there was a moral in that, because years later, when he spied another son reading Henry Miller's philosophical novel, "Tropic of Cancer," Gertz just let the boy read on.

"I noticed he never finished it," Gertz said. "I asked him why. He said it was dull — and dirty."

Insight

BOTH "TROPIC" AND "My Life and Loves" are in Chicago bookstores today because of Elmer Gertz, the city's senior citizen of civil liberties.

As lawyer for Grove Press, he wiped out Chicago police bans on the Miller and Harris books, and the works of the Marquis de Sade.

It was his legal defense of one nude movie that killed Chicago's motion picture censorship ordinance last year.

Recently, he defended bookseller Barbara Kaye against charges of selling obscene material — the underground newspaper Seed. The court held that the newspaper, judged as a whole, was not obscene and the charges were dismissed.

ELMER GERTZ'S censorship battles have drastically altered what we can read and see in Chicago today. But he is probably better known as the man who got Nathan Leopold out of prison after Leopold had served 33 years.

In 1958 Gertz's brilliant arguments persuaded a seemingly hostile Illinois Parole and Pardon Board to release Leopold, the surviving half of the notorious pair of teen-agers who murdered 14-year-old Bobby Franks in 1924. Leopold has led a model life since his release.

Last week Gertz pressed with the board to parole another Chicago killer he considers rehabilitated, Paul Crump. Gertz helped save Crump from the electric chair in 1962. The request was denied Wednesday.

THERE SEEMS TO be a sharp line between his two great causes — freedom of expression and freedom for rehabilitated prisoners.

When he talks about Crump and Leopold, he sounds like a devoted friend, deeply committed to them. He's not always so fond of the material he defends from censorship bans.

He thinks his landmark cases, "Tropic of Cancer" and "My Life and Loves," are great literature. Some of his nude movie cases, however, are "a lot of garbage," he says. "But I would defend the right of any man to be a pig."

"These marginal works must be defended, since they exist, to guard against creeping en-

Chicago lawyer Elmer Gertz
"I am here to be vigilant day and night"

croachment of the Bill of Rights and its guarantees of freedom of expression. "All before can step on [illegible] reading a book

Turn to Page A-5, Column 1

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C 3/4-13

CHICAGO DAILY NEWS, Wednesday, March 25, 1970

Insight

A 'prude' defends sexy books, films

[illegible]

BY opening a movie because they think it's obscene, they send many try to stop or ban reading a book or seeing a movie because they disagree with it personally," he says.

HE SIMPLY CAN'T [illegible] the idea of censors — police, judges, [illegible] — acting as moral guardians. "I remember [illegible] when he was small he would [illegible] what he can read or see.

"We have the right to decide for ourselves, by ourselves or not [illegible]," he argued. He said every law needs to certainly a standard.

"A movie can not [illegible] for children, even if the girls fall on a bag.

"BUT IN THE area where most should have the greatest freedom, we customarily say, 'No, you can't get at literature on consenting adults.'

"And the one who tells us this may be a judge who never reads or who has no conception of taste. Or a cop who doesn't know how to read. A cop with the whole spending habit."

Like a student of fact, Cohen has four cases currently from policemen that have almost ended action groups.

Cases against police

That brings up another of his [illegible] [illegible] [illegible]

Exhibit E

Effective police protection
for our homes and our lives
is a danger—unless
law-enforcement officers
are protected
against unjust smears

Behind Those "Police Brutality" Charges

BY FRED E. INBAU

PATROLLING his beat in Rochester, N.Y., on a Sunday night in May 1965, policeman Mike Rotolo spotted a hoodlum in a group of teen-age boys smashing a lighted sign. "Hey, you in the white shirt, you're under arrest!" he yelled, chasing the fleeing youths behind a building. All at once he was alone, facing the gang.

"Keep your hands off him, white man," growled a voice. A glint of metal flashed. As 160-pound Rotolo cautiously approached, the burly vandal charged. The policeman grabbed him, managed to snap one handcuff on a wrist, but the youth yanked loose and swung the dangling cuff at Rotolo. The patrolman fought back with his nightstick. Seconds later, more police arrived and took the young man away, charging him with malicious mischief, assault and resisting arrest.

Within 48 hours a militant civil-rights group called FIGHT held a mass meeting on "police brutality," and a spokesman demanded that "racial bigots" be purged from the police force. The next day a superior told Mike Rotolo that he was suspended. The youth's parents had charged him with "brutality." Suddenly, publicity caused the officer's wife to be snubbed, and their three-year-old boy ran home crying that he could no longer play at a friend's house.

Eventually, Rotolo was cleared, but the ugly smear continues to haunt him. Recently a young man he arrested during a street disorder

J. Murphy laments, "is now apprehensive about doing *anything* in these situations because of always being second-guessed. If I were on a beat today, I would share his apprehension."

Collect Your Check. Although reluctant to admit publicly that they would ever fail to carry out their duty, dozens of policemen in a number of cities have quietly admitted to me that many laws are not enforced because of possible repercussions. Just a few weeks ago, an order was issued in New York City which requires that any policeman who fires his gun for any reason whatsoever, and injures someone, must be "benched" until the matter is thoroughly investigated.

Nothing, however, has so shaken policemen as what happened to two Chicago patrolmen. Responding to a call for help one night in October 1964, they tried to disarm two men who were terrorizing a neighborhood with a broken bottle. Told to "come and get it," the officers subdued the men only after one of the patrolmen was given a slash across the face that later required 27 stitches.

At the trial, police testimony was undisputed. Nevertheless, a newly elected judge freed the men, explaining that the slashing had been justified because the officers had "no business to pull a gun and attack a citizen."

Understandably, Chicago policemen were outraged. Both officers involved in the incident complain that it is constantly being thrown in their faces by criminals. Another policeman commented, "It's better just to shy away from trouble when you run across it." Still another said, "A lot of us have decided that we're just going to collect our paychecks from now on."

Despite All Claims. State and federal laws carefully restrict police use of excessive force and prescribe penalties for officers who misuse it. Typically, states authorize a policeman to "use any force he *reasonably* believes to be necessary" to make an arrest or to subdue an attacker, but what is "reasonable" and "necessary" must be determined case by case. Moreover, authorities severely penalize police misconduct. In Arlington, Va., a 24-year veteran lost his temper one day and kicked and slapped a handcuffed woman. Police Chief William Fawver promptly investigated and dismissed him from the force. In Blackfoot, Idaho, a few years ago, a policeman arrested a man in a barroom brawl, took him to the city limits and beat him unconscious. A federal court convicted the officer for violating the 1870 civil-rights law.

Proved "brutality" complaints, however, are infrequent, despite all the claims. The Civil Rights Division of the Justice Department received 1778 complaints of criminal violations against police during fiscal 1965. Of this number, only 45 contained enough validity to be presented to a grand jury. In the 33 cases terminated, only *five* police-

door in an explosion of splinters. A man in the house knocked her down, and she lay sprawled in the doorway when the police arrived. She was taken to a precinct station, booked, then hospitalized.

Shortly after, she made a formal complaint that she was walking along, minding her own business, when the police stopped her, accused her of breaking and entering, then beat her. "The brutal treatment I received was a violation of my civil rights!" she shrilled. Her charges were dismissed.

4. Communists who exploit the "brutality" slogan to undermine law and order. Known communists and their sympathizers have engaged in police-baiting and brutality smear operations in such diverse areas as the Philadelphia and Harlem riots of 1964, the Watts riot of 1965 and the current wave of anti-Vietnamese-war demonstrations. The FBI considers the tactic so insidious that it has issued special instructions to its agents, explaining that the communist aims are "to arouse the passions of the people against law enforcement; to mislead the public; to smear, discredit and weaken law enforcement everywhere; and to divide, confuse and reduce seriously the strength of the opposition to communism."

Blaming all "police brutality" charges on the communists would be as incorrect as dismissing entirely the Red role in false anti-police propaganda. However, says Dr. Stefan T. Possony of Stanford University, an authority on Red psychological warfare: "It doesn't matter whether the propagandist's motive is outright subversion or simply extremist irresponsibility. The potential results of deliberate faking of accusations are the same: the communists want general public acceptance of the 'police brutality' slogan so they can achieve police disarmament."

Man in the Middle. Today's police officer is truly a man in the middle. Sociologists agree that slum dwellers often turn on police as symbols of the "power structure" that they blame for their plight. Policemen are expected to be social workers, judges, doctors and priests when they go on duty; yet often they do not get the official support they need. The former police chief of a major city privately told me, "Some politicians seem to regard gaining the political support of minority groups as more important than treating their accusations against police with fairness and objectivity."

The police role has been made still harder by instances of unbelievable judicial leniency toward criminals.* Take the case of the three young men with long police records who made a vicious and unprovoked attack on Chicago police officer Frank Perry in 1963. The attackers pleaded guilty. Astonishingly, Cook County Judge Leslie E. Salter called Officer Perry a "crybaby" and turned his assailants loose on mere probation.

Compare with this the treatment

*See "Take the Handcuffs off Our Police!" The Reader's Digest, September '64.

Pittsburgh Press Sunday March 20/66

...sing Effectiveness'

Police Disrespect Feared Out Of Hand

WASHINGTON, March 19 (UPI)—A leading figure in law enforcement fears that police may soon be engulfed by a mounting wave of unpopularity.

"We're being psychologically and physically cudgeled to the point where we may soon be ineffectual," says Quinn Tam. "When this happens, all America is on the brink of a 20th Century age of darkness.

Mr. Tam, 55, a former assistant FBI chief, is executive director of the International Assn. of Chiefs of Police (IACP), an organization of nearly 6000 members which conducts research, training and police improvement programs.

Mr. Tam believes that disrespect for the law and its officers is being raised to an alarming level by constant disparagement of police by militant civil rights forces, abetted by some segments of the sociological, judicial, political and journalism fields.

To reverse the trend, he urges stepped-up community relations efforts by police and understanding and support from the public and its representatives in city halls, state capitols and Washington.

"I am not at all embarrassed to say that the police of this country need help," he declared.

Mr. Tam said a survey by the IACP indicates police "are suffering verbal abuse, provocation, defiance and interference with lawful arrests and other police functions more than they ever have before."

Rainier's Granny An Actress, Too

Women's News Service

BRUSSELS, Belgium — Princess Ghislaine de Monaco, widow of Prince Louis, the former ruler of Monte Carlo, has begun a series of European lectures here in connection with the publication of her book, "Be A Princess."

"I am at ease on the lecture platform because, like Princess Grace, I was an actress before marrying a Monacan ruler," she explained.

"Prince Rainier has followed in his grandfather's footsteps by falling love with a theatrical star."

Red Plot To Discredit Police Told

DESERET NEWS November 25, 1951

A nationwide campaign by Communist subversive leaders to discredit police officers is under way, Supt Lyle Hyatt of the State Highway Patrol warned Thursday.

Mr. Hyatt was briefed on the situation at meetings last week in Sacramento, Calif., of a committee of the International Association of Chiefs of Police, of which he is a member.

"When large groups of people gather, efforts are being made continually by well-coached agitators to promote some form of physical violence," he said.

"Police, who must maintain peace and order, then must apply some form of physical force with the result that pictures are taken and published in an attempt to show that the enforcement officers are employing 'gestapo' tactics," he told.

Once the people lose confidence in the police, they can soon be incited into a state of mind where they begin to attack them, with the result that law and order is undermined, he said.

Principle speakers at the meetings were Dr. Fern Stukenbroeker, administrative assistant to J. Edgar Hoover, director of the Federal Bureau of Investigation; and Tom Fitzpatrick, in charge of investigating subversive activities for the San Francisco Police Dept.

BLUE PRINT FOR REVOLUTION
(By Mario Garcia Kohly)

The "Blue Print for Revolution" was written by General Bayo. He was Spanish by birth and by choice an international communist and an expert on revolution. Castro completed his "Blue Print for Revolution" and by its use rose to power.

Shortly before I left Cuba I had an opportunity of hastily scanning this document in the Congress Building of Havana. My conduct very nearly resulted in causing my arrest. In this "Blue Print" General Bayo gave in their order of execution and in detail the steps that must be taken to bring about the overthrow of a government through revolution. Holding it in my hands and casting my mind back over the preceding months I realized how precisely each and every step has been taken and carried out. I realized also that the success promised by this document if followed accurately was already in Castro's hands. One of the most important of these steps was the developing by carefully planned propaganda of a belief in police brutality. This belief must be created by all possible means and the details of this step were given. The very first was the control and ownership of all news mediums which must be bought up by the communist in advance. With this accomplished the development of the theme of police brutality could be repeated until the public fully accepted it.

In countries where students were active in political affairs they must be brought into direct conflict with the law. In countries where the students were not active, then racial minorities must be used to create the incidents that could be portrayed as "police brutality". Trained party members working among the students, or racial minorities, must arouse convictions of wrongs and injustice until these students, or minorities began public demonstrations in the hope of having the offending conditions changed.

This would be the beginning of the conflict between the police and the students of racial minorities that would make possible the creation of the belief in police brutality. Every least injury suffered by a student was magnified and the cry of police brutality increased daily in volume. Communist infiltrators among the students became more violent in their resistance to the efforts of the police to maintain law and order. This would cause the police in turn to be more violent in their efforts to defend themselves and would give greater opportunity to portray incidents labled police brutality. Martyrs among the students must be created. The student who killed a policeman must be hailed as a hero. The policeman that killed a student even if in defense of his own life, must be branded a murderer and the cry of "police brutality" rose louder and louder.

Bayo explained the importance of creating an image of "police brutality" in this manner. The police, in the mind of the public, represented the executive authority of the government in power. They were its servants and acted in accord with its dictates. If the image of "police brutality" was accepted by the public, the high officials who were directly responsible for these officers of the law and their actions would also suffer the smear of police brutality and a conviction would emerge that the government was brutal, unjust and to be feared.

The destruction of faith and trust in the officers of the law is automatically the destruction of faith and trust in the government.

When I read Bayo's "Blue Print for Revolution" the last step had already been taken and had succeeded. The heads of the Cuban Republic had fled to safety elsewhere and Castro had ridden into Havana to implant Communism, terror and slavery on a betrayed people, who even then, did not realize that through cleverly administered brain washing, they had been delivered into Castro's hands. That "Blue Print for Revolution" had proven accuracy in obtaining definite results.

In the beginning when the rioting first started the police had been given orders that there must be no bloodshed. The students or communists among them were quick to realize that retaliation in kind and not follow the injuries they inflicted and they lost no time in taking advantage of the situation.

The police used water hoses and method of a like kind in their efforts to prevent violence and control the rioters. The students realising they had a good thing made the most of it. Police were knocked down, kicked, trampled and injured but there was no comment of "student brutality". Instead the propaganda of police brutality continued with the students provoking incident after incident in which the servants of the law fared worse and worse. Events reached the stage, where, if the order of no bloodshed had not been drawn, the police force would have quit entirely and walked out.

Later, when dogs and mounted police were used the rioting mobs had a new weapon. "Animals against people", they charged "Roman Circus" and "Christians thrown to beasts". That the police were far outnumbered brought no praise for their bravery in their efforts to restore law and order. That many of them died in the performance of their duty brought no comment. TV showed but one side of the picture—that the police did to the students but never what the students had done to provoke the incident.

While these events were taking place in Cuba, in the U.S.A. the image of Castro as a Robin Hood was being portrayed. (I understand that he is now known as the "Robber Hood"). So effective was this propaganda that I found it impossible to warn officials in Washington or American business men any where of what was really under way in my country. I spent considerable time and money to my avail.

With the stage all set in Cuba for the final act the last step of Bayo's Blue Print was put into execution. Days and night bombs exploded. In apartment building, in theaters, in stores, in empty building; anywhere and everywhere. To make matters worse for the frightened public living phosphorous was spread in restaurants, stores, buses, in fact anywhere that it may come in contact with human bodies and produce horrible burns. There was no safety anywhere. Neither in the street outside or in the walls of their own home. Terror prevailed and the people united in their demand for the government to abdicate. The people blamed the government for all their suffering and misfortune. The legitimate government of Cuba gave up the unequal fight and fled.

Their reason for this decision and act, was so that there would be an end to bloodshed. They wished to spare the people of Cuba further suffering.

I doubt if there was one among them who knew that the real reason for their act threw was Bayo's "Blue Print for Revolution." I frankly would have never have realized what had happened to the Cuban people if I had not had the hurried opportunity of scanning this amazing document.

The world knows the rest to some degree. Castro, without opposition rode into Havana on a Sunday on the last day of 1958. Blood has flown steadily ever since and the Cuban people have been subjected to every form of torture that human minds could invent. My countrymen, know now that its far better to be dead than Red and here come to know it too late.

Police Movement

EXTENSION OF REMARKS
OF
HON. JOHN R. RARICK
OF LOUISIANA
IN THE HOUSE OF REPRESENTATIVES
Wednesday, April 19, 1967

Mr. RARICK. Mr. Speaker, our fellow countrymen must be given to understand that the so-called demonstrations and the indignities against America and American institutions are neither spontaneous nor independent. These mobs, defying every convention and alibiing their actions with a veil of "free speech," "dissent," et cetera, are only pawns—pitiable, misguided pawns—being exploited and manipulated in a well-designed, excellently scheduled program to undermine and crumble local law and order, to create artificial crises and a climate of "hate the police."

A timely and intriguing statement on the execution and success of such a program in the Communist revolution that brought Castro to power in Cuba is Mr. Mario Kohly's article, "Blue Print for Revolution." I insert Mr. Kohly's observation in the Record for all to study:

FILED
FEB - 8 1971
H. STUART CUNNINGHAM
At _____ o'clock _____ M.
CLERK

Office of the Clerk
U.S. House of Representatives
Washington, D.C. 20515

I, W. Pat Jennings, Clerk of the United States House of Representatives, as certifying officer for the House of Representatives, do hereby certify that the attached is a true and correct copy of the Congressional Record of April 19, 1967, as ordered printed by the House of Representatives on April 19, 1967, as evidenced by the Journal of the House of Representatives on April 19, 1967, First Session of the Ninetieth Congress.

In witness whereof, I hereunto affix my name and the Seal of the House of Representatives, in the City of Washington, District of Columbia, this twenty-first day of September, Anno Domini one thousand nine hundred and seventy.

W. Pat Jennings
Clerk, U. S. House of Representatives

W. Pat Jennings
Clerk

Office of the Clerk
U.S. House of Representatives
Washington, D.C. 20515

I, W. Pat Jennings, Clerk of the United States House of Representatives, as certifying officer for the House of Representatives, do hereby certify that the attached is a copy of House Report No. 1935 of the 90th Congress, Second Session, as ordered printed by the House on October 1, 1968, and entered in the Journal of the House of Representatives on October 1, 1968.

In witness whereof, I hereunto affix my name and the Seal of the House of Representatives, in the city of Washington, District of Columbia, this twenty-first day of September, Anno Domini one thousand nine hundred and seventy.

Clerk, U. S. House of Representatives

FILED
FEB -3 1971
H. STUART CUNNINGHAM
Clerk

served in the California Legislature in 1949. He was a Member of Congress from 1950 to 1954 and has been mayor of Los Angeles since 1961.

His tenure in the California Legislature in the mid-1930's gave him an opportunity to study the subject of communism, and since that time the witness has maintained an interest in Communist activities.

In answer to a question concerning his opinion of underlying factors which caused the riots in the last few years, Mayor Yorty replied:

I would certainly say that one of the factors is the constant repetition of subversive propaganda, the agitation and propaganda conducted by the Communist Party within the framework of their historic objective to break down the respect for government, certainly for law and order, and to personalize, as they always do, this objective mainly in the police officer.

Asked if he believed these riots had been spontaneous or planned, the mayor said:

I think that there are some of both. * * *

* * * * * * *

I think that the propaganda over the years has been so constant and at times very effective * * *.

I also think there are some riots where subversive forces have actually planned * * * incidents that they would hope would spark a riot.

Mr. Yorty produced as an exhibit for the record a pamphlet entitled "The Big Lie," which he had prepared as mayor of Los Angeles and which contained a short history of the charges of police brutality extending over a period of 21 years—since 1946—by the Communist Party.

The witness stated that law enforcement has been handicapped "by the reinterpretation, really the rewriting of the Constitution by the United States Supreme Court * * *." He cited as examples of such "rewriting" the exclusionary rule of evidence, the rules of search and seizure, and the registration of known criminals.

Mayor Yorty recalled that Lenin had made reference to "police brutality" in his writings as early as 1902, and noted that he knew of no period in history when the "campaign against the police has been quite as effective as it is today."

The mayor was asked if police brutality charges were made in his city during the Watts riot, and he replied that an attempt was made "to blame the police for the rioting," and added:

This led to my unpleasant confrontation with Dr. Martin Luther King. * * *

* * * * * * *

he persisted in arguing that the police were to blame for the rioting. Then he went out and got before the cameras and newspapers and made that same charge. I felt it necessary to answer that charge and to tell him that it was very unfair for him to come out to Los Angeles and try to blame the police for the rioting.

Mayor Yorty then stated that he did not "know of any case where an officer has had to be dismissed for brutality."

The mayor noted that there were many people who made charges of police brutality whose motive was to discredit the police department and to carry on the so-called Communist struggle campaign to "break down respect for the law enforcement officials and * * * eventually * * * break down the ability of our Government to operate."

I, FRANCIS R. VALEO, Secretary of the Senate of the United States of America, do hereby certify that the document hereto attached (consisting of pages 1 through 32, inclusive) is an official printed copy of a hearing before the Subcommittee to Investigate the Administration of the Internal Security Act and Other Internal Security Laws, Committee on the Judiciary, United States Senate, Eighty-seventh Congress, first session, dated June 13, 1961, entitled "A Communist Plot Against The Free World Police;" which hearing was printed for the use of the Committee on the Judiciary.

IN TESTIMONY WHEREOF, I hereunto subscribe my name and affix the seal of the Senate of the United States of America at the city of Washington, this the 21st day of September, A. D. 1970.

Francis R. Valeo

Secretary of the Senate of the United States

an editor and personnel director, of the Bureau of National Affairs, a publishing concern which David Lawrence had established to issue several technical journals.

In June 1942, I went to work for the Office of the Coordinator of Information. When the Office of Strategic Services was created from that staff, I was assigned to OSS, went to London, and in 1944, landed with the 1st United States Army in Normandy. I was transferred in August of that year to Gen. Omar Bradley's 12th Army group and served until V-E Day as General Bradley's G-2 briefing officer. While I was in the United States en route to a new assignment in the China-Burma-India theater, the Japanese surrendered and, after some months, I became an editor of the news magazine, World Report, another David Lawrence enterprise.

Mr. SOURWINE. When did you become associated with CIA.

Mr. KIRKPATRICK. In 1947, when Gen. Hoyt Vandenberg was named Director of the newly established Central Intelligence Group, he asked me to assist in organization of some parts of the undertaking. I took leave from the magazine and have remained with CIA.

Mr. SOURWINE. I believe you served as Division Chief, Assistant Director, and as executive assistant to the Director before you assumed your present position?.

Mr. KIRKPATRICK. That is right.

Mr. SOURWINE. You believe that the organization has become an important facility in the security field and that its services are needed in a cold war as much as in a hot war?

Mr. KIRKPATRICK. I do. I think it is imperative that the security forces of the free world be kept currently informed of subversive activities anywhere in the world which may affect their countries. I believe, also, that the public should be alerted whenever it appears they are likely to be the unwitting tools or the victims of a specific campaign of subversion.

Mr. SOURWINE. Mr. Kirkpatrick, last year the Internal Security Subcommittee published a staff study rounding up details of recent riots against constituted authority all over the free world, including the United States. Copies of that small pamphlet disappeared like magic, indicating, it would seem to me, a deep concern among the American people lest this type of protest should get out of hand.

Now, I am sure those who read that pamphlet, and many others who asked for copies we couldn't supply, will profit by the explanations you gave of handling this form of revolt and the suggestions you offered for avoiding the traps set by the highly skilled Communist agents who may always be found directing these mass upheavals.

Will you proceed, please, at your own pace?

Mr. KIRKPATRICK. Senators and Mr. Sourwine, many of us know what is back of the mob violence which we have been considering. It is probable, however, that few of the demonstrators realize that they are victims of a war that is being waged in the free world today. It is a life-and-death struggle between communism, which makes the people the slaves of the state, and free world democracy, in which the state carries out the will of the people.

Our police are among the foremost guardians of freedom and thus a major target of the Communists. The better the force, the greater its efficiency, the higher its competence in preserving the peace, the

more vital it is for the Communists to destroy it. I understand it is the committee's desire that I outline the tactics of Communist subversion and describe several case histories illustrating their technique for attacking the police.

The international Communist organization provides a training manual for espionage agents in which their duties are enumerated. This pocket-sized pamphlet was seized in Europe. Let me paraphrase the tasks assigned to agents in one of the countries of the free world.

First, make investigations and report on the activities of the police and security services.

Second, investigate and repress those security organizations which support the government.

Mr. SOURWINE. Would that task include action against such organizations as CIA, the FBI, and even this subcommittee and the House Committee on Un-American Activities?

Mr. KIRKPATRICK. I would assume so.

Third, find ways to infiltrate into the police and security organizations to steal documents—particularly those recording their knowledge of communism—and to destroy everything of value.

I believe that the manual is specific enough in those instructions.

Senator DODD. We had sworn testimony a few months ago that almost the first thing the Castro forces did when they took over Havana was to destroy all government records of Communist investigations, including the dossiers of more than 250,000 Communists and Communist supporters.

Mr. KIRKPATRICK. I have a second example. Let me describe briefly the history of the Communist war against the police in one of the major countries of the free world. I should state initially that this particular country has a long history of excellent police service and a law, dating back many years, requiring that the police force be completely divorced from all politics. Further, until the Communist politicians started to create trouble in recent years there had never been an incident on record showing political interference with the administration of the police force.

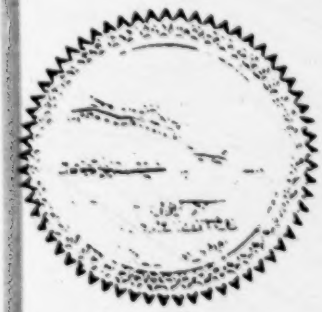
In this particular nation there is a national police force which has five levels but is organized on a national, provincial, and local basis. The Communist technique has been directed primarily toward discrediting the police in the eyes of the people. On the local level, Communist troublemakers would start fights in public places in order to involve the local police. When the police went into action, the troublemakers linked arms in an effort to show that it was the police who were causing the incident.

The handbook from which I have been quoting very generously provided graphs or sketches to illustrate this point. Of course, they are designed to facilitate training of Communist agitators. The sketches show, in the most elementary fashion, how crowds can succeed in crushing police opposition. Those not familiar with Communist techniques will more easily understand, by examining the pictures, how a few well-trained Communist agitators can utilize crowds for their purposes. I have photo copies here, somewhat enlarged, which I shall leave with the committee. Attached to each is a brief description of the situation it is designed to portray.

W. Pat Jennings
Clerk

Office of the Clerk
U.S. House of Representatives
Washington, D.C. 20515

I, W. Pat Jennings, Clerk of the United States House of Representatives, as certifying officer for the House of Representatives, do hereby certify that the attached is a true and correct copy of the Congressional Record of September 24, 1965, as ordered printed by the House of Representatives on September 24, 1965, as evidenced by the Journal of the House of Representatives on September 24, 1965, First Session of the Eighty-Ninth Congress.



In witness whereof, I hereunto affix my name and the Seal of the House of Representatives, in the City of Washington, District of Columbia, this twenty-first day of September, Anno Domini one thousand nine hundred and seventy.

W. Pat Jennings
Clerk, U. S. House of Representatives

[From U.S. News & World Report, Sept. 27, 1965]

POLICE BRUTALITY: HOW MUCH TRUTH—HOW MUCH FICTION?

(By J. Edgar Hoover, Director of the Federal Bureau of Investigation)

The cry of "police brutality" is being heard all across the land with increasing frequency.

It is a charge which strikes fear into the heart of every freedom-loving man.

Is it, however, a charge which is justified in the United States? Or is it a charge made with malicious intent by some individuals who have little concern for the truth so long as their interests are served?

Yes, there is police brutality in the United States, but certainly not to the extent which some would have you believe.

Like all conscientious law-enforcement officials, I abhor any misuse of police authority. It is inexcusable and cannot be tolerated. Thankfully, it is not tolerated, for in most instances the few misfits and unsuited individuals who get into law enforcement and improperly use their authority are ferreted out and eliminated as soon as possible.

How extensive is police brutality? We can only gage this on the basis of complaints received by the FBI from the victims or other sources. At this point, I want again to state clearly and without equivocation that I am opposed to police brutality in any shape or form. We know that there are instances of police brutality, particularly in the less progressive police organizations. I want to emphasize that any allegations of police brutality coming within this Bureau's jurisdiction will receive immediate and thorough investigative attention, and that the facts developed in these investigations will be furnished to the Department of Justice for prosecutive consideration. Statistics of these investigations in the last 3 fiscal years present the following picture:

In fiscal year 1963, there were 1,376 allegations of brutality received by the FBI. Investigations of these complaints resulted in indictments being returned in 12 of the cases involving 20 officers. Convictions were recorded in three cases involving four officers.

In fiscal year 1964, there were 1,592 complaints of police brutality. Sixteen of these cases resulted in indictments against 28 officers, and convictions were recorded in two cases involving 4 officers.

Fiscal year 1965 brought 1,787 allegations of police brutality with indictments being

E9

returned in 13 cases involving 20 . . . are Convictions resulted in five cases involving six officers.

While many complaints of police brutality are made sincerely and in good faith, some charges are unfounded, and irresponsible. Often it is obvious they are made purely for the purpose of intimidating local law-enforcement agencies and harassing the FBI.

FBI agents in our southern offices have been referred from one civil rights worker to another in their efforts to run down allegations of police brutality. Individuals who allegedly possess the facts often are "unavailable for interview" when agents arrive to investigate.

Earlier this year, FBI agents interviewed one person who had sent a telegram to a Government official containing, among other things, allegations of police brutality. He stated he had objected to these allegations being included in the telegram, since they did not have merit. Another official of the organization concerned, however, had insisted the irresponsible charges be included, he said.

There have been irresponsible and brutal acts by certain law-enforcement officials and, because of them, it has been easy to spread the impression that many or all law-enforcement officers operate in the same manner.

However, some changes are unfounded. Occasionally, allegations of police brutality result in prosecution of the complainant when it can be conclusively shown that he has purposely filed a false complaint. FBI investigations into such complaints, therefore, can result in prosecution of the accuser or the accuser.

Many complaints of police brutality, however, are never officially lodged with the FBI or any other law-enforcement organization. They are indiscriminately made to representatives of various news media, shouted from the soap box at a street corner rally, proclaimed from the podium and often from the pulpit, and circulated through printed pamphlets.

Rarely is proof offered in support these blatant accusations, which are designed mainly to incite the listener or the reader. Many riots or near riots which have occurred in this country in recent months have been provoked by such charges.

Charges of police brutality also have been heard with great frequency before, during, and after the drunken orgies and youth riots which have occurred at some of our resort areas in recent years.

Allegations of police brutality have been "supported" by still and motion pictures which invariably show one or more policemen subduing or carrying a semi- or participant in the disorder. Rarely do these pictures reveal the full story—the unprovoked attacks on the officers involved which necessitated their use of force.

It is a known tactic of international communism to take advantage of both real and contrived opportunities to undermine constituted law-enforcement by bombarding it with charges of brutality. We know the Communist Party, U.S.A., as well as various splinter Communist organizations in this country have used this tactic. Communist adherents have fanned the flames of passion wherever unrest against law enforcement has been prevalent. Frequently, Communist agitators have been sent into areas of unrest to stir their words of treason through the spoken and printed word. The Communist press continually grinds forth distortions, often outright falsehoods, about police intimidation and brutality. The Communists miss no opportunity to blacken the name of a representative of law enforcement or the profession as a whole.

But only do the Communists directly exploit unrest, but they frequently spread their germs of subversion through front groups and dupes. This tactic has become increasingly evident in recent demonstrations by young people where police have been charged with brutality in handling picket lines or demonstrations involving racial matters or protests against U.S. involvement in Vietnam.

Communist adherents are schooled in methods of intimidating law enforcement. Whenever they are confronted by a law-enforcement officer, the word brutality is foremost upon their lips. It is their aim to humiliate, exasperate and provoke the law-enforcement officer in an effort to prevent his judicious and calm enforcement of the laws he is to uphold.

I am not implying that all charges of police brutality emanate from the Communists or their dupes. If this were true the problem could more easily be solved. The fact is, however, such charges are coming from the well-meaning, if ill-informed and poorly advised, citizens.

On the other hand, I recognize that one of the greatest preventives of brutality is a responsible and alert citizenry which is quick to complain.

The conflict resulting from the false charges of police brutality is a problem which must be solved, for it is eroding the already declining respect for law and order in our great Nation. When our laws no longer enjoy the respect of our citizens, then our present form of government will be lost. It is just as important that the enforcers of the law be given respect, for without it their task will be impracticable.

There is no panacea, no pat solution to this problem, for it exists primarily in the hearts and minds of men. It is a problem in human nature, a problem in man's relation to man and his physical surroundings.

An efficient police force is the first line of protection for the law-abiding citizen. The conscientious law-abiding citizen should rise in righteous anger against those who falsely cry "police brutality" to cover their insidious scheming to gain something they covet but are not willing to acquire the judicial way.

There is a constant barrage of brutality allegations and obvious attempts by certain elements to control the police through "citizen review boards" to hear charges, many of them fabricated. It is a wonder that men are willing to don a policeman's uniform and put their lives on the line every time they step out onto the street.

It should be noted that the majority of advocates of this solution are members of, or are allied with, the minority groups which most frequently allege police brutality. They contend such boards would help convince minority groups that they can receive fair treatment, would act as a deterrent on the few police officers tempted to abuse their powers, and would result in reasonable restraints being imposed on officers, and would be an impartial means of clearing the air of irresponsible charges.

On the opposite side are the vast majority of law-enforcement officers, including myself. There already is sufficiently adequate machinery to handle complaints against law-enforcement officers established within the framework of the agencies themselves and the constituted government under which they operate. An independent review board would abridge the administrative authority which should rest with the responsible officials of the agency; it would undermine the efficiency and sap the morale of the agency; and it would deter officers in the proper performance of their duties for fear of having charges placed against them which would be judged by individuals wholly unfamiliar with law enforcement work. Naturally, every special-interest group in a community would demand representation on any such board.

Some self-styled spokesmen for the civil rights movement have advocated the establishment of an independent Federal agency to handle all investigations relating to civil rights matters. They are openly critical of the FBI's objective handling of such investigations, and apparently will be satisfied only with some super-Federal agency which will do their work and call. Objectivity and impartiality are not their name. Rather, they seek a rubber-stamp agency which will approve their claims without regard for law. Certainly, there is no place for such an organization in a democratic society.

What has been accomplished in the [illegible] fields under the FBI's policy of [illegible] objectivity? In the last several years FBI investigations in 170 counties in 4 Southern States resulted in numerous suits being filed by the Department of Justice which enabled thousands of previously disenfranchised Negroes to register to vote.

The FBI investigation of the brutal murder of three civil rights workers in Philadelphia, Miss., in June 1964, resulted in 21 individuals being arrested in connection with this crime. Elsewhere in Mississippi, FBI investigations brought a halt to a series of bombings of Negro churches and homes. Nine men were arrested and subsequently pleaded guilty or were convicted. Ten were, however, released on probation after being given suspended sentences by a Federal court.

"THEY DID HAD PERPETRATED THE KLAN"

Today, the FBI has effectively penetrated the Ku Klux Klan and thus is aware of most of its activities and plans. An FBI informant in the Klan enabled almost immediate arrest of the individuals charged in connection with the recent murder of Mrs. Viola Liuzzo on a lonely road between Selma and Montgomery, Ala. We shall continue pressing every investigation in the civil rights field, but objectivity will always be the standard.

Great strides have been made in elevating law enforcement to a professional status worthy of respect. But more can be done. Personnel standards of law-enforcement agencies need to be raised in some areas. I undoubtful this can ever be accomplished as long as society neglects the law-enforcement officer in terms of salary. Here, positive action can be taken, but many who profess to be seeking solutions have totally ignored this need.

The police officer is human. He has a family which looks to him for the necessities of life. He feels pain when he is hurt, indignation when he is cursed, anger when he is spat upon, and humiliation when he or his fellow officers are ridiculed. He will be not in an air-conditioned office—it is a cold night in the city alleys where danger lurks at every moment. He is the lone person called when trouble arises and the first one condemned when something goes wrong.

Such are the requirements of law enforcement, and, if one member of the police commits some wrong, his guilt is ours as well. Law enforcement needs brutality. Neither his school nor college education alone will make a good law-enforcement officer. He must be trained in the techniques of enforcement, schooled in the responsibilities of his job, and taught the rudiments of human relations so that he can be a law enforcement. Above all, he must learn self-control, lest he be hailed into court [illegible] needed.

NON-DEMONSTRATIONS AND "EXPLOSIVE"

On the opposite side of this issue there is need for some elimination, also, for there are middle and irresponsible individuals who are most active in fostering unrest. The civil rights movement has made great progress but not without cost. A few spokesmen for the movement have been among those who have made irresponsible and inflammatory statements. There is good evidence, in fact, that some so-called civil rights demonstrations have been designed specifically with the hope of ensuring law-enforcement [illegible]

Exhibit F

INVESTIGATION OF UN-AMERICAN PROPAGANDA ACTIVITIES IN THE UNITED STATES

SPECIAL COMMITTEE ON UN-AMERICAN ACTIVITIES HOUSE OF REPRESENTATIVES

SEVENTY-EIGHTH CONGRESS

SECOND SESSION

ON

H. Res. 282

TO INVESTIGATE (1) THE EXTENT, CHARACTER, AND OBJECTS OF UN-AMERICAN PROPAGANDA ACTIVITIES IN THE UNITED STATES, (2) THE DIFFUSION WITHIN THE UNITED STATES OF SUBVERSIVE AND UN-AMERICAN PROPAGANDA THAT IS INSTIGATED FROM FOREIGN COUNTRIES OR OF A DOMESTIC ORIGIN AND ATTACKS THE PRINCIPLE OF THE FORM OF GOVERNMENT AS GUARANTEED BY OUR CONSTITUTION, AND (3) ALL OTHER QUESTIONS IN RELATION THERETO THAT WOULD AID CONGRESS IN ANY NECESSARY REMEDIAL LEGISLATION

COMMITTEE PRINT

APPENDIX—PART IX

COMMUNIST FRONT ORGANIZATIONS 1944

WITH SPECIAL REFERENCE TO

THE NATIONAL CITIZENS POLITICAL ACTION COMMITTEE

FIRST SECTION

UNITED STATES
GOVERNMENT PRINTING OFFICE
WASHINGTON : 1944

ELMER GERTZ. Guest Lecturer. Author of *The People* vs. *The Chicago Tribune*, *Frank Harris: A Study in Black and White*, *The Epic of the Prairie State*, and other writings. Formerly branch circulation manager of the Chicago Evening American; faculty member of the Jewish People's Institute; director of public relations of Illinois Police Association; founder of the Civil War Round Table; member, National Executive Board of the National Lawyers Guild, president of the Chicago Chapter, and chairman of the Committee on the Press in Wartime; member, Illinois State Bar Association, Illinois State Historical Society, and the Abraham Lincoln Association; practicing attorney.

Exhibit G

ABRAHAM LINCOLN SCHOOL (Chicago, Ill.)

1. Cited as an adjunct of the Communist Party.
   (*Attorney General Tom Clark, letter to Loyalty Review Board, released December 4, 1947.*)
2. Successor of the Workers School as a "Communist educational medium" in Chicago.
   (*Special Committee on Un-American Activities, House Report 1311 on the CIO Political Action Committee, March 29, 1944, p. 82.*)
3. "Schools under patriotic and benevolent titles indoctrinate Communists and outsiders in the theory and practice of communism, train organizers and operatives, recruit new party members and sympathizers * * *. Schools of this type" include the Abraham Lincoln School, Chicago.
   (*Internal Security Subcommittee of the Senate Judiciary Committee, Handbook for Americans, S. Doc. 117, April 23, 1956, pp. 91 and 92.*)

NATIONAL LAWYERS GUILD

1. Cited as a Communist front.

   (*Special Committee on Un-American Activities, House Report 1311 on the CIO Political Action Committee, March 29, 1944, p. 149.*)

2. Cited as a Communist front which "is the foremost legal bulwark of the Communist Party, its front organizations, and controlled unions" and which "since its inception has never failed to rally to the legal defense of the Communist Party and individual members thereof, including known espionage agents."

   (*Committee on Un-American Activities, House Report 3123 on the National Lawyers Guild, September 21, 1950, originally related September 17, 1950.*)

3. "To defend the cases of Communist lawbreakers, fronts have been devised making special appeals in behalf of civil liberties and reaching out far beyond the confines of the Communist Party itself. Among these organizations are the * * * National Lawyers Guild. When the Communist Party itself is under fire these offer a bulwark of protection."

   (*Internal Security Subcommittee of the Senate Judiciary Committee, Handbook for Americans, S. Doc. 117, April 23, 1956, p. 91.*)

W. Pat Jennings
Clerk

Office of the Clerk
U.S. House of Representatives
Washington, D.C. 20515

I, W. Pat Jennings, Clerk of the United States House of Representatives, as certifying officer for the House of Representatives, do hereby certify that the attached is a copy of House Document No. 398 of the 87th Congress, Second Session as ordered printed by the House on April 12, 1962, and entered in the Journal of the House of Representatives on April 12, 1962.

In witness whereof, I hereunto affix my name and the Seal of the House of Representatives, in the city of Washington, District of Columbia, this twenty-first day of September, Anno Domini one thousand nine hundred and seventy.

W. Pat Jennings

Clerk, U. S. House of Representatives

REPORT ON Exhibit H

THE NATIONAL LAWYERS GUILD

Legal Bulwark of the Communist Party

81st Cong.
2nd Session

SEPTEMBER 17, 1950

et H
id.

Prepared and Released by the
COMMITTEE ON UN-AMERICAN ACTIVITIES, U. S. HOUSE OF REPRESENTATIVES
WASHINGTON, D.C.

W. Pat Jennings
Clerk

Office of the Clerk
U.S. House of Representatives
Washington, D.C. 20515

I, W. Pat Jennings, Clerk of the United States House of Representatives, as certifying officer for the House of Representatives, do hereby certify that Juliette P. Joray is the duly appointed Recording Clerk of the Committee on Internal Security of the House of Representatives.

In witness whereof, I hereunto affix my name and the Seal of the House of Representatives, in the city of Washington, District of Columbia, this twenty-first day of September, Anno Domini one thousand nine hundred and seventy.

W. Pat Jennings
Clerk, U. S. House of Representatives

[redacted]

CONGRESS OF THE UNITED STATES
HOUSE OF REPRESENTATIVES
COMMITTEE ON INTERNAL SECURITY
WASHINGTON, D.C. 20515

September 21, 1970

TO WHOM IT MAY CONCERN:

I, JULIETTE P. JORAY, duly appointed Recording Clerk of the Committee on Internal Security of the House of Representatives, to which was transferred the records of the Committee on Un-American Activities on February 18, 1969, do hereby certify that the attached pamphlet entitled REPORT ON THE NATIONAL LAWYERS GUILD LEGAL BULWARK OF THE COMMUNIST PARTY originally released as a Committee print on September 17, 1950, 81st Congress, and made a House Report on September 21, 1950, by the Committee on Un-American Activities is a true copy of same and that I am the custodian of said record.

GIVEN under my hand this 21st day of September, 1970.

Juliette P. Joray
Juliette P. Joray
Recording Clerk

FILED
FEB - 8 1971
H STUART CUNNINGHAM
At ..... o'clock .....
CLERK

STATEMENT OF COSTS

1. Printing costs for Answer Brief of Appellee (Scheffer Press, Inc. Invoice #30485) for the following:		
36 Pages	$ 270.00	
Covers	16.00	
2 Pages Index	28.00	
Footnotes	127.40	
Filing and service by mail	8.50	
Gross bill for Answer Brief	$ 449.50	
Less filing and service by mail	— 8.50	
Less discount	—21.60	
Net Appellee's Cost		$ 419.40
2. Printing costs for supplemental Appendix (Scheffer Press, Inc. Invoice #30839) for the following:		
141 Pages	$ 916.50	
Covers	18.00	
3 Pages Index	42.00	
Overtime	75.00	
Exhibits, reduce, prepare layout, make plates and print	526.00	
Excessive underscoring	208.00	
Hang and indent	20.85	
Bindery	17.70	
Filing and service by mail	5.00	
Running titles	77.85	
Net Appellee's Cost Brought Forward		$ 419.40

Gross Bill Supp. Append.	$1,906.90	
Less Discount	—141.00	
Less filing & service by mail	— 5.00	
Less portion of supp. append. specifically included to accommodate the cross appeal in cause #71-1175 (22 pages of text and one page of index)	—159.00	
Net Appellee's cost		$1,601.90
Total Appellee's Costs		$2,021.30

State Of Illinois
County Of Cook—ss.

James A. Boyle, Jr., being first duly sworn on oath, deposes and says as follows: He is the duly authorized attorney for Defendant-Appellee in the above case, and that he has knowledge of the details of the matters presented in the foregoing Statement of Costs; that each item in the foregoing Statement of Costs is correct and has been necessarily incurred in this case, and the services for which the said fees were charged were actually and necessarily performed.

/s/ James A. Boyle, Jr.

Subscribed And Sworn to before me
this 11th day of August, 1972.

.....

Notary Public

MOTION TO RECONSIDER THE TAXING OF COSTS

Now Comes Plaintiff-Appellant-Appellee, Elmer Gertz, pro se, and by his attorney, Wayne B. Giampietro, and moves the Court to reconsider the taxing of costs on appeal in the within cause in the amount of $2,021.30 and in support thereof represents unto the Court as follows:

1. Rule 39 (a), Federal Rules of Appellate Procedure, states that "if a judgment is affirmed, costs shall be taxed against the appellant unless otherwise ordered", thus leaving the matter of taxing of costs to the discretion of the Court.

2. The decision in the within matter was a close one, as indicated by the opinions filed by the Court, and was an extension of previously existing law.

3. Plaintiff had obtained a verdict from a jury in the within cause, which was set aside by the trial court.

4. Plaintiff herein presented important matters of public policy pertaining to all attorneys and their rights in the field of libel and slander.

5. The decision of the trial court in granting judgment notwithstanding the verdict was based upon a major shift in the trial court's view of the law applicable to this case.

6. Defendant's counsel as much as admitted in his closing argument to the jury that the statements made of and concerning plaintiff in the article involved herein were false.

7. In view of the foregoing, it would be inequitable to tax costs herein against Plaintiff.

Wherefore, Plaintiff-Appellant-Appellee prays that this this Court enter an order herein requiring each party to bear its own costs in connection with the within appeal.

/s/ Wayne B. Giampietro
Elmer Gertz, pro se and
Wayne B. Giampietro
Attorneys for Plaintiff-Appellant-Appellee

OBJECTION TO PLAINTIFF-APPELLANT'S MOTION TO RECONSIDER THE TAXING OF COSTS

Now comes defendant-appellee, Robert Welch, Inc., by its attorney, James A. Boyle, Jr.; and objects to the motion to reconsider the taxing of costs, and as grounds and reasons therefor, states as follows:

1. Plaintiff-appellee cites no reason sufficient in law to divest defendant-appellee of its right to be reimbursed part of its expenses of appeal. The arguments suggested in support of the said motion would be relevant only if damages and costs were being sought pursuant to the filing of a frivolous appeal.

2. The "closeness of the case", envisioned by plaintiff, characterizes every spirited contested appeal. The judgment of the trial court was not modified. No dissenting opinion was given. The appeal was prosecuted by the attorney-plaintiff, concededly in good faith, with full knowledge of the rules relating to costs.

3. The rule apportioning the burden of costs on appeal is objective, universal in its application, and one of the detering factors in the post-trial decisions of disap-

pointed litigants. Plaintiff seeks an immunity from his obligations under the rule, and thus, a preference, upon such grossly subjective considerations as to abrogate the intended self-executing application of the rule.

/s/ James A. Boyle, Jr.
Attorney for Defendant-Appellee-Appellant

Order, United States Court of Appeals for the Seventh Circuit, entered September 12, 1972:

On consideration of the motion of Plaintiff-Appellant-Appellee Elmer Gertz, pro se, and by his attorney, for an order of this Court reconsidering the taxing of costs on appeal in the amount of Two Thousand Twenty-One and 30/100 Dollars ($2,021.30),

It Is Ordered that said motion to reconsider the taxing of costs on appeal be and the same is hereby Denied.

Supreme Court of the United States

No. 72-617

Elmer Gertz,

Petitioner,

v.

Robert Welch, Inc.

ORDER ALLOWING CERTIORARI. Filed February 20, ---------- , 1973.

The petition herein for a writ of certiorari to the United States Court of Appeals for the Seventh ---------- Circuit is granted.

-61 FILE COPY

Supreme Court, U. S.
FILED
OCT 20 1972
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-617

ELMER GERTZ,

Petitioner,

vs.

ROBERT WELCH, INC.,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

ELMER GERTZ, *pro se*
WAYNE B. GIAMPIETRO
120 S. LaSalle Street
Suite 1805
Chicago, Illinois 60603
Attorneys for Petitioner

MIDWEST LAW PRINTING CO., CHICAGO 60601, FINANCIAL 6-3868

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No.

ELMER GERTZ,

Petitioner,

VS.

ROBERT WELCH, INC.,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

To the Justices of the Supreme Court of the United States:

Petitioner, Elmer Gertz, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit affirming the decision of the United States District Court for the Northern District of Illinois, Eastern Division, granting

a judgment notwithstanding the verdict in favor of defendant after a jury verdict awarding plaintiff Fifty Thousand Dollars ($50,000.00) for libel.

This cause is a diversity action for libel, arising out of the publication by defendant of an article entitled "Frame up, Richard Nuccio and the War on Police", in its monthly magazine "American Opinion" and thereafter in a pamphlet reprint. Plaintiff, an attorney, contended that this article libeled him by calling him, among other epithets, a "Leninist" and "Communist-fronter" and "Red." He was awarded a jury verdict of Fifty Thousand Dollars ($50,000.00). Subsequent to the entry of this verdict, the trial court entered judgment notwithstanding the verdict in favor of defendant. The judgment was affirmed by the Court of Appeals.

OPINIONS BELOW.

The opinion of the Court of Appeals is as yet unreported, and is reproduced as Appendix "A" to this Petition. The opinion of the District Court is reported at 322 F. Supp. 997, and is reproduced in Appendix "B" to this Petition. The order denying Plaintiff's Petition for Rehearing is not reported and is reproduced in Appendix "C" to this Petition.

JURISDICTION.

The judgment of the Court of Appeals for the Seventh Circuit was entered on August 1, 1972. A petition for rehearing with a suggestion for rehearing en banc was filed on August 15, 1972, and denied on September 12, 1972. The jurisdiction of this Court rests on 28 U.S.C. §1254 (1).

QUESTIONS PRESENTED.

1. Whether plaintiff, who was referred to and treated in an admittedly defamatory article as a private attorney, was a public figure within the requirements of the First Amendment?

2. Whether an article alleging a communist conspiracy to harass the police, with no evidentiary support therefor, is a matter of such public interest and importance as to require anyone mentioned therein, however peripherally or slightly (as was plaintiff), to prove actual malice in order to recover for libel?

3. Whether plaintiff was denied due process of law as a result of being precluded by the court from introducing evidence of actual malice?

4. Where the court states that, in this case, the law limiting recovery in libel has been narrowed, for the first time, to the greatest permissible extent, is it a violation of due process to tax thousands of dollars in costs against an admitedly defamed attorney, in light of the discretion of the court in assessing costs?

STATEMENT OF THE CASE.

Plaintiff, Elmer Gertz, is, and has been for over 40 years, an attorney licensed to practice before the courts of the State of Illinois, both local and federal, as well as in several other states and this Court. At all times he has enjoyed a high reputation, both as an attorney and as a citizen of the United States. During this period of time he has written reviews and articles and three books. He has often spoken in public and has been a member and officer of various legal and community organizations. Largely because of his preoccupation with his law practice, he was much less active than usual in community organizations, public appearances and writing in the months immediately preceding the publication of defendant's article and the pamphlet reprint thereof. Prior to the publication of that article in April of 1969, he had never held or run for any public office, or held any position from which he had received any remuneration from the government.

In June, 1968, a young man named Ronald Nelson was shot and killed by Richard Nuccio, a police officer of the City of Chicago. Plaintiff was retained as a private attorney for the family of the deceased youth to represent them in private civil suits brought against the police officer in the Circuit Court of Cook County and the United States District Court for the Northern District of Illinois. At no time did plaintiff ever make any public statements of any kind in regard to these cases, nor was he ever publicly quoted as to Nuccio or the cases. While

some newspaper articles appeared regarding the fact that Officer Nuccio had been criminally tried and convicted of murder, none of them referred to plaintiff, with the exception of one or two very short articles which merely stated passingly that he had filed civil suits against Nuccio on behalf of Ronald Nelson's parents.

In March, 1969, the April issue of "American Opinion", published by defendant, appeared on the newstands across the country. It contained as its lead article, "Frame up, Richard Nuccio and the War on Police." This article contained several false and defamatory statements of and concerning plaintiff, among which are the following:

p. 5—

"The file on Elmer Gertz in Chicago Police Intelligence takes a big, Irish cop to lift. According to the Communist *Worker* of December 8, 1964, he has signed a petition to abolish the House Committee on Un-American Activities. On May 12, 1966, he sponsored another such petition, published by the Illinois division of the American Civil Liberties Union—founded by Harry F. Ward, one of the top Communists in the United States. Gertz also was a pallbearer for Jack Ruby, the 'lone fanatic' who killed the 'lone fanatic' who killed the President of the United States. He has been an official of the Marxist League for Industrial Democracy, originally known as the Intercollegiate Socialist Society, which has advocated the violent seizure of our government."

pp. 5-6—

"The Communist parade in April included the usual Communist violence. Apparently, the traitors were practicing for what they planned to do in August. And just as the phony Walker Commission and its *Walker Report* followed the terrorism in August, so a Commission and a report called *Dissent and Disorder* fol-

lowed the terrorism in April, financed by the Roger Baldwin Foundation of Communist Harry Ward's A.C.L.U. After an 'impartial investigation,' the A.C.L.U.'s Commission ridiculed 'the inaccurate impression that the April 27 event was a left wing affair'; exonerated the Communist Chicago Peace Council, which ran it; and naturally blamed the violence the Communists caused on the Chicago police: 'On April 27, at the peace parade of the Chicago Peace Council, the police badly mishandled their task. Brutalizing demonstrators without provocation, they failed to live up to that difficult professionalism which we demand.'"

"And the Chief Counsel for the Commission which committed *Dissent and Disorder* was the same Elmer Gertz who now turns up as lawyer for the Nelsons in the attack on Officer Nuccio."

"In fact, the only thing Chicagoans need to know about Gertz is that he is one of the original officers, and has been Vice President of the Communist National Lawyers Guild—which has been described by the House Committee on Un-American Activities as 'one of the foremost legal bulwarks of the Communist Party'—and which probably did more than any other outfit to plan the Communist attack on the Chicago police during the 1968 Democrat Convention."

p. 9—

Below a photograph of Elmer Gertz there appears the following: "Elmer Gertz of Red Guild harasses Nuccio."

p. 10—

"Like millions of other Americans, he was watching an organized attempt to discredit our local police—organized primarily by the Communist National Lawyers Guild, preeminent in which is the same Elmer Gertz who now appears as the Nelsons' lawyer."

p. 12—

"The C.P.C., as you will recall, is the Communist outfit headed by a Communist and defended by Leninist Elmer Gertz, who now turns up as lawyer for the Nelsons."

p. 17—

"Two Chicago Assistant Corporation Counsels warned Nuccio not to testify at the coroner's inquest, for fear what he said might jeopardize their defense against Communist-fronter Gertz." (R. 17)

Not only did this article appear in "American Opinion", but it was also distributed in reprint form in the streets of Chicago, as well as elsewhere. In fact, this is how the article first came to plaintiff's attention.

After looking into the matter to determine liability, plaintiff brought suit almost immediately against defendant. Despite the commencement of suit and service of summons upon defendant and the information contained in the complaint, completely discrediting the defamatory article, distribution of the article, both in magazine and reprint form, continued unabated in substantial amounts, for months afterwards, almost to the very time of trial.

Defendant moved to dismiss the complaint for failure to state a claim upon which relief can be granted, or, alternatively, for failure to satisfy the requisite jurisdictional amount. This motion was denied by the District Court, which held that it was libelous *per se* to falsely label one a Communist. The court went on to hold that since the article dealt with plaintiff's participation as counsel in certain private law suits, it therefore reflected primarily and directly upon his profession and practice of law. The Court held that the charges contained in the article imputed to plaintiff a want of the requisite qualifications to practice

law, as such an imputation must necessarily cast grave doubts upon his qualifications to uphold, apply and interpret our system of laws, which is opposed by Communist theory, and was therefore actionable *per se*.

In conducting the *voir dire* the trial court inquired all of prospective jurors whether they had heard anything about plaintiff. Not one indicated that he was familiar with plaintiff in any way, which the District Court found significant in concluding that plaintiff was not a public figure.

At the trial, defendant made no effort to prove that any of the statements in the article concerning plaintiff were true. It admitted that "prior to the publication of the controverted article, and at the time of the promulgation thereof, this defendant had no knowledge concerning the plaintiff other than the article itself. In publishing the article it relied solely upon the reputation of the free-lance writer, Mr. Stang for accuracy." Despite this, the managing editor of the magazine admitted at the trial that he personally had written in the magazine that the author of the article had conducted extensive research into the Nuccio case and had gotten the facts. He further wrote that the trial of Officer Nuccio was part of the Communist war on police, and that the article was so important that reprints would be made immediately available. He also wrote a caption under plaintiff's picture in the article stating: "Elmer Gertz of Red Guild harasses Nuccio".

The managing editor admitted that his sole source of information for each of these statements was the article itself. He made no attempt to verify any of this information appearing in the article. No other attempt was made by anyone on behalf of defendant to verify this information.

In fact, the idea for the article was generated by the managing editor, who approached the author, informed him of the Nuccio case and requested him to look into the situation, with a view to meeting the specific needs of American Opinion magazine. Defendant considered this a very important article and rushed it into print more quickly than usual. In effect, the article was designed and tailored by defendant, vouched for by it, and edited so as to express defendant's viewpoint.

American Opinion magazine espouses the doctrines and viewpoints of the John Birch Society. The magazine is distributed through American Opinion Book Stores, children of the same corporate father, the John Birch Society. There are approximately 280 of these stores across the country. About 42,000 copies of the magazine were circulated through the subscription list, and 86,000 reprints of the article were distributed across the country by defendant. These magazines and reprints were still being sent out in large numbers in the spring of 1970, months after the filing of the instant cause and service of process.

Plaintiff testified that at no time had he been contacted by anyone regarding the research for this article or any of its allegations. He denied all of the specific defamatory statements concerning him contained therein, including the following:

1. He had never been a member of the League For Industrial Democracy, the Intercollegiate Socialist Society, nor any organization, whether named in the article or otherwise, which purportedly advocated the violent seizure or overthrow of the government.

2. He was never involved in a Peace Parade in 1968 in Chicago, nor at any time.

3. He had no connection whatsoever with the Walker Commission or its Report.

4. He had never heard of "The Red Guild."

5. He has never been a member of the Chicago Peace Council.

6. At no time has he ever espoused a Leninist or Communist doctrine, nor any similar doctrine, nor has he at any time ever been a Leninist or Communist or Marxist nor anything similar.

7. He had been legal counsel for the Sparling Commission, a group of leading citizens, which issued a report entitled "Dissent and Disorder", but none of the members of the Commission was in any way connected with any Communist organization.

8. At no time did he have any connection with any criminal case against Nuccio. He appeared and asked questions at the inquest on the deceased, Ronald Nelson, in behalf of the family. That inquest reached no conclusion as to the cause of death of Ronald. There were also other attorneys present at that inquest, including an attorney for Nuccio.

9. He never attended any of the sessions of any criminal case against Nuccio, nor did he make any public statements regarding either the criminal or civil cases.

Gertz testified that he does not believe in violence of any kind. No evidence to the contrary was offered. He testified as a lawyer with 40 years' experience that no attorney who is a Communist, Leninist or Marxist can properly represent clients who have property, financial or business interests, because Communism negates private property.

Gertz testified that he believes in the institution of private property and has represented clients with property, financial and business interests. Most of his practice has related thereto.

At the time the article was published, the Chicago Police Department had no intelligence file on plaintiff. It was utterly untrue, as claimed in the article, that there was a file on Gertz so big that it "takes a big, Irish cop to lift."

Defendant offered no witnesses to establish any alleged Communist conspiracy against the police and no evidence whatsoever of any kind, character or description to link Gertz with any such alleged conspiracy. Defendant admitted that Gertz is not directly a part of any such conspiracy. In closing argument, counsel for defendant admitted that the charges made by defendant against Gertz are untrue.

Plaintiff requested that defendant be required to produce Alan Stang, the author of the defamatory article, as an adverse witness. On defendant's several times repeated representation that Stang was simply a free-lance writer over whom it had no control, the court refused to require defendant to produce him and denied plaintiff's requested instruction on the matter as to the inferences to be drawn. After the proceedings were over, plaintiff learned for the first time that defendant had deliberately misrepresented the situation to the court; that in fact Stang was a contributing editor of American Opinion and contributing editor, as well, of another John Birch Society Magazine and one of the chief participants in its speakers bureau—an important part of the John Birch apparatus.

The cause was submitted to the jury under instructions which held that plaintiff was not a public figure and which

informed the jury that the article involved herein were libelous *per se*. The jury returned a verdict in favor of plaintiff in the sum of $50,000.00.

After the rendering of this verdict, defendant filed a post-trial motion, upon consideration of which the District Court granted judgment notwithstanding the verdict in favor of defendant, holding that the article "painted the picture of a conspiratorial war being waged by the Communists against the police in general." The court found this subject matter to be clearly one of public interest protected by the First and Fourteenth Amendments, and in addition held that "by representing the victim's family in litigation brought against the policeman, Gertz thrust himself into the vortex of this important public controversy." The court then concluded that in order to recover plaintiff was required to show actual malice, that is, that defendant knew the statements were false at the time it printed them, or that it had made them with reckless disregard as to their truth or falsity. The court concluded that plaintiff had failed to prove such malice and therefore entered judgment in favor of defendant, despite the fact that he had concluded at trial that plaintiff was not required to produce such proof and that, therefore, plaintiff had not offered all of such available evidence of malice.

Plaintiff appealed to the United States Court of Appeals for the Seventh Circuit, which court affirmed the judgment of the trial court.

REASONS FOR GRANTING THE WRIT.

I.

PLAINTIFF WAS NOT SPOKEN OF IN A PUBLIC CAPACITY.

In affirming the decision of the trial court, the United States Court of Appeals for the Seventh Circuit stated:

> "It is one thing to omit the word 'alleged' from an otherwise accurate comment on a newsworthy subject; it is quite another to include a gratuitous and collateral remark about a participant in a public controversy. The omission, even if it makes the comment false, does not enlarge its subject matter beyond the area in which First Amendment protection is properly afforded. The addition of an unnecessary and irrelevant comment about a private individual is not automatically protected simply because it is contained in an article dealing generally with an important subject. Otherwise, a few introductory platitudes might be used as a justification for false and destructive invasions of the privacy of ordinary citizens.
>
> "In this case, the alleged affiliations were quite irrelevant to the murder trial. They were inserted in order to develop the thesis about a national conspiracy. To the extent that these comments lent any support to that thesis, they were either false or unconvincing. . . . Nevertheless, under the reasoning of New York Times, even a false statement of fact made in support of a false thesis is protected unless made with knowledge of its falsity or with reckless disregard of its truth or falsity."

The Court of Appeals indeed isolated the unique and important issue in this case: May a non-public person be defamed with impunity by a false statement which is irrelevant to the discussion of a matter which could possibly be termed a matter of public interest and importance? But, having isolated that issue, the Court of Appeals failed to give that issue the proper consideration which it deserved.

The central thesis of defendant's article was that the criminal trial of Richard Nuccio was the result of a Communist conspiracy to discredit the police in this country. In purportedly developing this thesis defendant went out of its way to draw plaintiff into this situation, although it is uncontradicted that plaintiff had no connection whatsoever with the criminal trial of Richard Nuccio or any purported conspiracy in connection with it. Plaintiff acted as a private attorney in private civil law suits for the parents of the boy who had been killed by Officer Nuccio. He made no public statements concerning the situation, nor was he in any way involved in the criminal trial. He stated no views regarding this matter publicly. At no time was he referred to publicly in connection with any of the cases involving Richard Nuccio.

None of the statements contained in the article referred to any of plaintiff's activities in connection with the Nuccio civil case. Starting from the fact that plaintiff represented the parents of the deceased boy, it then went on to defame him gratuitously by falsely stating that in the past he has been connected with various Communist and Communist-front organizations. Nothing said about plaintiff has any relation to his activities in regard to the Nuccio cases.

It has been held repeatedly and without exception that in order for a defendant to avail himself of constitutional

protection in a libel suit, his statements about the plaintiff must be in relation to plaintiff's public activities. *Belli* v. *Orlando Daily Newspapers,* 389 F. 2d 579 (5th Cir. 1967), cert. den. 393 U.S. 825; *Stearn* v. *MacLean-Hunter, Ltd.,* 46 FRD 76, 78 (SDNY 1969); *Afro-American Publishing Company* v. *Jaffe,* 366 F. 2d 649 (D.C. Cir. 1966).

Plaintiff is not attacked in the article for his views on the general subject matter of the article, and his views are not recounted or set forth as they relate to the fact situation discussed therein. He is, rather, attacked for what he had allegedly done previously, entirely unrelated to his private activities in connection with the civil suits against Nuccio.

To deprive plaintiff of his right to protect his essential dignity and reputation in this situation is to ignore his right to his own humanity. We have in this case competing interests which were not adequately explored by the Court of Appeals. This case does not involve a public statement about public activities of plaintiff regarding a matter of public interest and importance. Rather, it involves statements about a private individual concerning private actions having absolutely no connection with the matter of alleged public interest, except in the twisted and distorted mind of defendant. As was said by the Court of Appeals, "the addition of an unnecessary and irrelevant comment about a private individual is not automatically protected simply because it is contained in an article dealing generally with an important subject." Defendant deliberately went out of its way to attack plaintiff's alleged prior associations which had absolutely no connection with the criminal trial of the police officer, the main basis of the defamatory article.

The context in which Plaintiff was mentioned in the article was described thusly by the District Court:

> ". . . Caught up in the web of the alleged conspiracy, aside from Gertz, was such a disparate cast of characters as the Lake View Citizens Council, the Walker Report, a Roman Catholic priest, and the Chicago *Seed* (an underground newspaper). In fact, although Gertz's picture was displayed in the body of the article, he did not play a very prominent role in the article's expose of the purported war on police."

This situation calls into immediate play the interest of the State in protecting the individual against damage to his reputation. It cannot be said that there is automatic protection of the defendant in this case, under the First Amendment, when the defendant has made statements of and concerning plaintiff which have absolutely no connection with the central theme of the article. To so hold would allow each defendant to manufacture his own defense, thus abolishing the law of libel insofar as publishers are concerned, something which this Court has declined to hold in the past.

The fundamental error of both the District Court and the Court of Appeals was in failing to recognize that the policies which lead to the application of constitutional protection to matters of public interest is a flexible tool to be used in accordance with the legitimate policies behind the First Amendment. This does not mean that every person mentioned in an article is governed by the same rules. To do so would be to fall into the often condemned trap of exalting form over substance. Certainly different persons mentioned in the same article may be in different categories and subject to different rules. Clearly, the Assistant State Attorneys mentioned in the article are public officials and

fall within the ambit of First Amendment protection. Perhaps others mentioned in the article made public speeches and pronouncements regarding the subject matter, thereby thrusting themselves into the vortex of the controversy. But this does not mean that the mention of every person in an article dealing generally with a matter of possible public interest must thereby prove actual malice in the constitutional sense. To so hold would defeat the legitimate policy of protecting one who has not sought attack and who cannot defend himself. Such ruling would allow an unscrupulous publisher to bring in a person not legitimately connected with the subject matter of the article and defame him with a great measure of impunity in the guise of serving the greater public good. Such a result was never intended and would be a perversion of a laudable principle.

This is what occurred here. The gist of defendant's article was that the police in this country are being subjected to an attempt to discredit them by Communists, and that the criminal indictment and conviction of Nuccio was the result of such conspiracy. However, plaintiff had absolutely nothing to do with the criminal proceedings, as attested to by Nuccio's own attorney and even by defendant itself. Gertz represented private clients in a circumspect and inconspicuous manner. The attacks upon plaintiff was no legitimate part of the article or its subject matter.

When does a matter become a public issue of such nature as to bar a defamed plaintiff from recovery short of actual malice or gross recklessness? Is it when any extremist of the right or left or a mere zealot or crackpot declares it to be such, whether or not he is fair or reasonable? And how deeply must a plaintiff be involved in the matter in

order to prevent recovery on his part, assuming absence of actual malice or gross recklessness? If defendant's theory is adopted, all of us, including the most reputable lawyers, are at the mercy of those who lightly and without cause defame us.

Is every attorney, representing a client, to be exposed to the most scurrilous attacks, with absolutely no recourse? May a defamer concoct wholly fictitious stories about such an attorney which have no legitimate connection with the matter at hand? Are the members of the legal profession such public figures that they imperil their very livelihood to all unfounded attacks with absolutely no recourse? These issues must be considered very carefully and fully, not in an offhand manner.

It is submitted that these matters were not given the consideration which they require by the Court of Appeals. To say that the actual falsity of a statement does not deprive it of First Amendment protection adds little, if anything, to the policy decision which must be made. If the statements were true, there would be no issue, for this would be defense in itself. The question to be determined is not whether the statements are true or false, but whether the false statements are legitimately entitled to protection despite their falsity.

When a person or a corporation is at the center of an article, controversy or investigation, the result of which is of interest or concern to the public, there are strong policy considerations in favor of requiring a showing of actual malice in the constitutional sense. If it were otherwise, the right of the populace to obtain information would be effectively thwarted. The public indeed has a right to know about persons who have been arrested, (*Rosenbloom*

v. *Metromedia Inc.*, 403 U.S. 29, 91 S. Ct. 1811 (1971)), who consort with reputed gangsters (*Wasserman* v. *Time, Inc.*, 424 F. 2d 920, 922 (D.C. Cir. 1970), cert. den., 398 U.S. 940 (1970), *Time Inc.* v. *Ragano*, 427 F. 2d 219, 221 (5th Cir. 1970)), who delve into elections in foreign countries, *Time, Inc.* v. *McLaney*, 406 F. 2d 565, 573 (5th Cir. 1969), cert. den., 395 U.S. 922 (1969)), who deal in public health (*United Medical Laboratories* v. *Columbia Broadcasting System*, 404 F. 2d 706, 711-12 (9th Cir. 1968), cert. den. 394 U.S. 921 (1969), *Farnsworth* v. *Tribune Co.*, 43 Ill. 2d 286, 290-92, 253 N.E. 2d 408 (1969)), and who hold themselves out to accommodate the public (*Bon Air Hotel Inc.* v. *Time, Inc.*, 426 F. 2d 858, 860-62 (5th Cir. 1970)).

The same policies most emphatically do not allow a publisher to drag an innocent third party, who is not at the center of the public matter of an article, into a controversy for the mere purpose of defaming him, as was done here. Plaintiff was not being spoken of regarding the way in which he handled a case or represented a client, but he was spoken of as a Communist, a Marxist and a Leninist, completely divorced from anything else. What legitimate public purposes do such false and defamatory statements serve?

II.

PLAINTIFF WAS DENIED A FAIR TRIAL AND DUE PROCESS.

Throughout the entire proceedings in this cause, plaintiff proceeded on the assumption and theory that he was not a public figure, and that the subject matter of the article did not concern a matter of public interest and importance. The rulings of the trial court sustained this position throughout. In denying defendant's motion to strike, the District Court held that the article was libelous *per se*.

The court then struck those defenses contained in defendant's amended answer which attempted to raise the issue of public figure. The District Court then concluded that the publicity surrounding the Nuccio case was not relevant to the cause, and refused to allow defendant to introduce such evidence. Finally, the court held during the conference on jury instructions, that defendant was not entitled to raise the defense of the First Amendment privilege in this cause.

At the conclusion of the trial, the District Court held, for the first time, that plaintiff was required to prove actual malice in the constitutional sense, that he had not, and that therefore judgment must be rendered for defendant. Indeed, the trial court specifically precluded plaintiff from introducing much evidence at the trial (other than the continued widespread and substantial publication and distribution of the article and reprint) which would have indicated actual malice on the part of defendant. Then he was informed that his failure to produce this evidence was fatal to his case! Assuming that plaintiff is required to prove actual malice in the constitutional sense on the part of defendant, common fairness requires that he be awarded a new trial before a jury so that he has a full and fair opportunity to do so. At this point he has been deprived of such opportunity. The failure to afford plaintiff this right has deprived him of due process of law as guaranteed by the Fifth and Fourteenth Amendments. Nothing could be clearer.

That plaintiff could establish malice on defendant's part is evidenced by its continued and widespread publication and distribution of the admittedly defamatory article almost to the moment of trial and by the other facts and circumstances hereinafter set forth.

What is most surprising in the failure to grant plaintiff a new trial is that he had introduced much evidence of actual malice, in the constitutional sense, on the part of defendant, despite his not being required to produce such evidence. The presence of this evidence, which could be greatly elaborated upon and augmented at another trial, makes it clear that the failure to grant plaintiff an opportunity for such a trial deprived him of due process of law.

As was proved by plaintiff at trial, without any attempted contradiction by defendant, defendant's article did not contain simple exaggerations, discrepancies, or slight errors, but monumental misstatements, monstrous lies made out of whole cloth. There was not even the slightest basis for calling plaintiff a Communist, Communist-fronter, Leninist, Marxist, Red, or anything of that nature. These statements were not mere hyperbole or coloration, but completely false fabrications of the most damaging kind to an attorney dealing with private clients. Even if public issues were involved, defendant had no right to drag in and publish defamatory falsehoods about plaintiff who was an innocent bystander, representing purely private interests. The conclusions reached by this Court regarding the plaintiff in *Curtis Publishing Co.* v. *Butts,* 388 U.S. 130, 86 Supreme Ct. 1975 (1967), are clearly applicable to this case. Each of the following elements found in that case are present here: the story was in no sense "hot news"; elementary precautions were ignored; there was no support, independent or otherwise, for the statements made in the article; the author's notes were not viewed by any of defendant's personnel, but were published without substantial independent support; no attempt was made to check

with any of the others involved in this situation as to the accuracy of the statements made. As was stated in *Butts*, "the evidence is ample to support a finding of highly unreasonable conduct constituting an extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers."

There is no question that defendant is not what can be termed "a responsible publisher." It has a specific aim and viewpoint—to further the views of the John Birch Society, its parent organization. In fact, this article was not merely submitted by an independent writer, but was solicited and designed, in effect, and tailored by the managing editor of defendant, knowing that Stang, the writer, had previously labeled both Richard Nixon and Hubert H. Humphrey Marxists and lumped them with Eisenhower, Paul Hoffman, Nelson Rockefeller and other great Americans as conniving with the Communists. This is the kind of dastardly defamation upon which Stanley based his conclusion that Stang's facts are always accurate! His real attitude is reflected by his failure to produce Stang for examination.

Defendant cannot disavow Stang's defamation of plaintiff, because it vouched for the truth thereof in the very issue in which the article appeared. In the words of its managing editor, Scott Stanley, Stang had "conducted extensive research into the Richard Nuccio case," had "gotten the facts," and "that this is a part of the communist war on our police is as certain as the innocence of the officer they have chosen as their symbolic target." Stanley admitted at the trial that he had absolutely no basis for making these assertions, other than from the text of the article itself and the "implied relationship between an author and an editor." Indeed, there is much undisputed evi-

dence in the record to show either actual malice or gross recklessness, including the following:

a) For months following the filing of plaintiff's complaint, which put the defendant on notice of the defamatory statements contained in the article and reprint, and after service of process on it, defendant continued to sell and distribute many copies in Illinois and throughout the country. This in itself is evidence of malice. 33 Illinois Law & Practice, Slander & Libel § 122.

b) Defendant made no effort whatsoever to check the accuracy of any of the statements prior to publication, despite its knowledge that plaintiff is a lawyer, necessarily dependent upon maintaining his professional and community reputation.

c) Defendant must have known that it is extremely serious to call a lawyer a Communist, or Communist-Fronter, or Marxist, or Leninist or anything similar and this should have put it on notice to check carefully.

d) Since American Opinion is a monthly publication without the deadlines common to the daily press, it had ample opportunity to check the statements in the article.

e) Defendant was in an excessive hurry to publish and distribute the article and reprint.

f) Defendant's managing editor himself vouched for the accuracy of the article although admittedly he had no actual knowledge upon which to base such representation.

g) Defendant's managing editor himself placed defamatory captions with respect to plaintiff in the article.

h) Reprints of the article were literally forced upon people on the North side of Chicago, where plaintiff resides.

i) Defendant persisted in repeating the false charge that plaintiff is a Communist-fronter in its answers to plaintiff's interrogatories, despite the true information imparted to it in the complaint.

j) Defendant persisted in repeating the same defamatory statements about plaintiff from the witness stand during the trial.

k) Defendant misrepresented to the court and plaintiff the status of the author of the article, thus leading the court to make an incorrect ruling and precluding plaintiff from cross-examining Stang as adverse witness.

l) Stang did not contact Kachigian, Nuccio's attorney, nor did he contact Gertz. There is no evidence that he contacted others with knowledge of the facts. Defendant did not establish Stang's good-faith research. It carefully refrained from calling him to the stand for fear that his and its malice would be patent.

Thus, the testimony at the trial, coupled with the clear pattern of prior statements by defendant show that the article herein was one of a long line, which were not made with any thought of truth or accuracy in mind, but solely to advance the theories of defendant's parent organization, the John Birch Society, from which defendant receives $1,000,000.00 annually for disseminating its views. (Plaintiffs' Exhibit 4).

The appropriate rules to be applied here are set forth in *Goldwater* v. *Ginzburg*, 414 F. 2d 324 (2d Cir. 1969), cert.

den. 396 U.S. 1049, reh. den. 397 U.S. 978 where it is said at 337:

> "Reliance upon newspaper articles, books, and campaign literature, and upon accurate reprinting of another's letter are only factors which, with other factors, are probative of whether the publisher of the cumulated material was motivated by actual malice when he caused the full material to be published. Repetition of another's words does not release one of responsibility if the repeater knows that the words are false or inherently improbable, or there are obvious reasons to doubt the veracity of the person quoted or the accuracy of his reports. St. Amant v. Thompson, supra at 732, 88 S. Ct. 1323. Furthermore, in our case, Ginzburg added certain innuendoes to some quoted statements and quoted other statements out of context in order to support his predetermined result. One cannot fairly argue his good faith or avoid liability by claiming that he is relying on the reports of another if the latter's statements or observations are altered or taken out of context."

Here, there was much reason to doubt the veracity of Stang, despite the disclaimers of Stanley. Anyone who writes that Richard Nixon, Hubert Humphrey and Dwight Eisenhower are Communists, or are working for the Communists has little claim to credibility. Defendants are not allowed to state categorically that they relied upon Stang, for it was Stanley who set Stang upon the trail, asking for a story saying exactly what was ultimately printed. He, in behalf of defendant, vouched for Stang's accuracy, and caused reprints of this important article to be circulated throughout the United States, both at bookstores owned by the John Birch Society, and on street corners as well. And, after being placed on notice of the utter falsity of the

charges, these distributions continued, and Stanley attempted to repeat the libelous statements in his answers to interrogatories filed on behalf of defendant, and at trial, with absolutely nothing to support them. As was said in *Goldwater,* 414 F. 2d at 339-40:

> "There are many parallels between the evidence tending to prove actual malice in this case and the proof in Curtis Publishing Co. v. Butts, 388 U.S. 130, 87 S. Ct. 1975, 18 L. Ed. 2d 1094 (1967), which the Supreme Court held was sufficient to establish actual malice. The Goldwater article did not contain 'hot news'; the appellants were very much aware of the possible resulting harm; the seriousness of the charges called for a thorough investigation but the evidence reveals only the careless utilization of slipshod and sketchy investigative techniques; . . . and, obviously, there was evidence as to whether there was a possible preconceived plan to attack Senator Goldwater regardless of the facts. This evidence, together with the other facts brought out at trial established that the appellants not only knowingly published defamatory statements but also established with convincing clarity that the appellants were motivated by actual malice when they published these defamatory statements."

So also here, there is no question but that defendants had a pre-conceived plan to attack plaintiff, as well as the others mentioned in the article, and that the plan was to label all such persons communists, regardless of the facts. Defendant cannot sidestep responsibility for these calculated statements by saying that they relied upon Stang. They did not rely upon him, but sent him out to write this very article, telling him beforehand what he was to say. This is actual malice at its worst, and refusal to at least grant plaintiff a new trial was a grave miscarriage of justice.

III.

THE TAXATION OF COSTS AGAINST PLAINTIFF DEPRIVED HIM OF DUE PROCESS.

Under the provisions of Rule 39(a), Federal Rules of Appellate Procedure, the taxing of costs "shall be taxed against the appellant unless otherwise ordered," indicating that this matter is one which is to be considered in light of justice to the parties involved. The Court of Appeals taxed costs against plaintiff in the amount of $2,021.30, and denied plaintiff's petition to reconsider that order.

The decision of the Court of Appeals was a close one, as indicated in the opinions filed by the Judges of that court. It extended the previously existing law, as recognized by all parties concerned. Plaintiff had obtained a verdict from a jury, under the instructions given by the District Court, which then radically changed its view of the applicable law.

There is no doubt that plaintiff presented to the Court of Appeals, and now presents to this Court, important matters of public policy pertaining to all attorneys, as well as others, and their rights in the field of libel and slander.

In light of these facts, the taxing of costs against plaintiff is grossly unjust, particularly where defendant's counsel admitted in his closing argument to the jury that the statements made of and concerning plaintiff were false.

CONCLUSION.

This case presents issues of the utmost public importance. A victory for plaintiff would shore up our defenses against extremists of the right and of the left who would destroy the American democratic values and citizen participation in public affairs by misreading and misusing the freedom of expression guaranteed by the First Amendment. This does not constitute a quest for censorship or prior restraint of any kind, but only a plea that those who set out intentionally to defame a private person with no basis whatsoever, will be called to a court of law to account for their actions. This is further a plea that a private person, who has no other recourse but the courts, be allowed an opportunity to clear his name and reputation.

Wide leeway has been given to publishers and others to speak to the public where public officials, public figures and public issues are actually involved; provided the defamatory publication really treats the complaining person in his public capacity and the publisher is free from actual malice or such gross recklessness as is tantamount to malice. There can be no license to drag the name of innocent bystanders in the mud by making utterly false and highly damaging charges against them in the most irresponsible manner where the truth is readily available and could easily have been ascertained.

Defendant here made absolutely no attempt to prove the truth of the statements made concerning plaintiff, either at the time of publication or at the trial.

No lawyer's reputation will be safe if the mere fact of his being a lawyer is used to undermine his reputation and standing with clients, the courts and the public. Our system of justice will suffer if a lawyer must hesitate to represent private litigants because extremists may lie about him with impunity. The quality of justice in this country will thus be lowered if an attorney must, before concluding to represent a client, consider whether he is exposing himself to public attacks without an adequate opportunity on his part to vindicate himself. Public policy should favor a strong lawyer-client relationship, rather than weakening it while giving extremists carte blanche.

Wherefore, petitioner prays that this Court's Writ of Certiorari issue and that the judgment below be reversed.

Respectfully submitted,

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APPENDIX "A"

Opinion of the U. S. Court of Appeals

Before KNOCH, *Senior Circuit Judge,* KILEY and STEVENS, *Circuit Judges.*

STEVENS, *Circuit Judge.* Plaintiff's appeal[1] from an order entering judgment in favor of defendant notwithstanding the jury's $50,000 verdict presents two questions: (1) whether the First Amendment privilege as construed in *New York Times Co.* v. *Sullivan,* 376 U.S. 254, protects defendant's false and scurrilous comments about the plaintiff; and (2) if the privilege does apply, was the evidence insufficient to permit the jury to find that defendant's comments were made "with 'actual malice' —that is, with knowledge that [they were] false or with reckless disregard of whether [they were] false or not." *Id.* at 280.

Plaintiff is a reputable lawyer. Defendant published an article describing him as a "Communist-fronter," "Leninist," and participant in various "Marxist" and "Red" activties. The author of the article is not a party and did not testify. We assume, without deciding, that, as the district court held, the article was libelous *per se* as a matter of Illinois law and that its author was either deliberately or recklessly mendacious. Our concern is with the tension between the responsibility and the First Amendment freedom of the publisher.

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[1] Defendant cross appeals in No. 71-1175. Our disposition of plaintiff's appeal in No. 71-1174 makes it unnecessary to consider or decide any of the issues raised in the cross appeal.

I.

The libel was published in the April 1969 edition of *American Opinion*. The magazine's managing editor, one Stanley, explained its editorial policy, method of operation, and how the libelous article was commissioned.

Early in the 1960s, in furtherance of the aims of the John Birch Society, *American Opinion*, and an affiliated publication also edited by Stanley, began to promulgate "information" about a "nation-wide conspiracy to harass and intimidate the police." *American Opinion* published many articles by a number of different authors on this subject. One of them was Alan Stang, the contributor of the libel in suit. Stang was never employed by defendant or any of its affiliates, but had been a regular contributor since 1963. He was recommended to Stanley as an "accurate researcher and analyst" with professional training and experience.[2] His services were engaged by Stanley for special assignments consistent with the aims

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[2] In his affidavit in support of defendant's motion for summary judgment, Stanley stated in part:

"6. My first acquaintance with Allen Stang came as a result of the personal recommendations of two men. They are Samuel L. Blumenfeld, an editor formerly with Rinehart & Company, the Viking Press, The World Publishing Company, and Grosset & Dunlap. The other person recommending Mr. Stang was Noel E. Parmentel who was an essayist for several publications, among which were the *New Yorker*, *Esquire* and *National Review*. He was also a television writer and producer. Both Mr. Blumenfeld and Mr. Parmentel stressed Mr. Stang's ability as an accurate researcher and analyst.

"7. I was also advised that Allen Stang held an B. A. degree from City College of New York and a Masters degree from Columbia University. Further, that he was a business editor for Prentice-Hall Inc. and was a professional writer and researcher for NBC and for such network features as *Mike Wallace Interview* and *Biography*."

of the John Birch Society. Between 1963 and 1969 he wrote about 35 articles for Stanley.

Although Stang's articles provoked many letters, some strongly adverse, according to Stanley none challenged the truth of any of Stang's factual averments. Prior to the article in suit, none was the subject of a demand for retraction or a libel suit.

In December, 1968, Sanley requested Stang to prepare an article on the murder trial of a Chicago police officer named Nuccio. Stang accepted, came to Chicago to make an investigation, consulted with Stanley over the long distance telephone a few times, and submitted his completed draft on February 18, 1969, in time for inclusion in the April edition which was scheduled for distribution in early March. Stanley made no effort to verify the accuracy of anything said in Stang's article. Based on statements in the text, Stanley drafted an introductory comment[3] and captions for illustrations.[4] Before the article was conceived, Stanley, whose office is in Boston, had never heard of the plaintiff.

The article is 18 pages long. It is concerned with the trial and conviction of officer Nuccio for the crime of

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[3] "Alan Stang is a former business editor for Prentice-Hall, Inc., and a television writer, producer, and consultant. Mr. Stang is a frequent contributor to AMERICAN OPINION and is author of the Western Islands best-sellers, *It's Very Simple* and *The Actor*. Alan Stang has just returned from an investigative trip to Chicago, where he conducted extensive research into the Richard Nuccio Case."

[4] For example:
"Officer Richard Nuccio, shown here with one of his three children, was framed for murder"; and "Elmer Gertz of Red Guild harasses Nuccio."

murdering a 17-year old boy named Nelson. The article is intended to persuade the reader that Nuccio was the victim of a "frame-up," and that the frame-up was part of a national conspiracy to discredit local police forces; the purpose of that conspiracy is to lay the groundwork for the creation of a national police force, which, in turn, is a step toward a totalitarian state.

The article purports to analyze the evidence against Nuccio so incisively that the falsity of several witnesses' testimony at Nuccio's trial, and the error of the trial judge's finding of guilt, will be manifest to the reader.[5]

Plaintiff is mentioned because he was retained by the Nelson family to assert a civil claim for damages against Nuccio. In that capacity, he attended the coroner's inquest into Nelson's death. Notwithstanding his limited, professional interest in the matter, the article implied that plaintiff was the architect of a gross miscarriage of justice. A purported relationship to a nationwide conspiracy was suggested, in part, by frequent references to the National Lawyers Guild, of which plaintiff had been a member and which Stang repeatedly described as a Communist front.

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[5] The district court summarized the article:

"A closer examination of the article shows that its theme was more general and far reaching than just the trial of one Chicago policeman for murder. Instead, it painted the picture of a conspiratorial war being waged by the Communists against the police in general. Caught up in the web of the alleged conspiracy, aside from Gertz, was such a disparate cast of characters as the Lake View Citizens Council, the Walker Report, a Roman Catholic priest, and the Chicago *Seed* (an underground newspaper). In fact, although Gertz's picture was displayed in the body of the article, he did not play a very prominent role in the article's expose of the purported war on police."

About 42,000 copies of the magazine were distributed nationally and about 86,000 reprints were printed, of which about 5,000 were sold or given away in Illinois. The article came to plaintiff's attention because a copy was handed to his partner's wife while she was shopping. He promptly filed this libel action in the federal court, alleging that various statments in the article were false and defamatory.

Ruling on various pretrial motions, the district court held as a matter of law that the publication was libelous *per se,* and that applicability of the *New York Times* standard depended on issues of fact that could not be resolved on summary judgment.

At the trial plaintiff established that defendant had made no independent verification of any of the statements in Stang's article, that critical comments about plaintiff were false and unsupported, and that plaintiff was a well known and well regarded member of the Illinois bar.[6] Defendant sought to prove that it was justified, on the basis of past experience, in assuming, without checking before publishing it, that Stang's article was accurate. Defendant also offered to prove that it did in good faith seek to verify the statements about plaintiff after the suit was filed, but the court sustained plaintiff's objection to the relevance of this testimony.

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[6] The district court stated:

"At trial, Gertz testified as to his stature and reputation in the community. He is a prominent attorney in Chicago, having represented clients who sometimes command a wide following in the press and media. He has written books, articles and reviews which have enjoyed wide circulation. He has appeared frequently on radio and television, and has delivered numerous speeches. And he has long been involved in civic affairs."

No proof of actual damages was offered. Under the court's instructions, the jury was permitted to presume injury as a matter of law. As noted, it assessed plaintiff's damages at $50,000. The district court set aside the verdict and granted defendant's motion for judgment n.o.v. In a thorough memorandum, the court concluded that even if plaintiff himself was not a public figure, the subject matter of the article was clearly of public interest,[7] and that although defendant's failure to check the accuracy of the article was negligent, the evidence presented at the trial was not sufficient to support a finding of actual malice or reckless disregard for the truth.

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[7] "By analogy to the above cases, and to those cited in *Bon Air Hotel, Inc.* v. *Time, Inc.*, [426 F. 2d 858,] at 861, n. 4 [(5th Cir. 1970)], I think that the subject matter of 'Frame-Up' was clearly one of public interest protected by the First and Fourteenth Amendments. A Chicago policeman's killing of a criminal suspect, and the policeman's subsequent indictment for murder at a time when the police generally were the subject of attacks within the community, commanded wide public attention and interest. By representing the victim's family in litigation brought against the policeman, Gertz thrust himself into the vortex of this important public controversy. *Curtis Publishing Co* v. *Butts*, [388 U.S. 130,] at 155. In affording First Amendment protection to defendant's publication, I reiterate that Gertz played a small part in the vast sweep of the whole article. What this court concerns itself with primarily is the public's right to become informed on a matter of public interest, rather than with any right to know about persons who have injected themselves into the limelight on that matter. See *United Medical Laboratories* v. *Columbia Broadcasting System*, [404 F. 2d 706] at 712 [(9th Cir. 1968), *cert. denied*, 394 U.S. 921]. The penumbra of First Amendment protection falls equally on references to Gertz, the Lake View Citizens Council, the policeman charged with murder, and the Chicago *Seed*."

II.

Plaintiff's principal contention on appeal is that the standard of *New York Times Co.* v. *Sullivan*, 376 U.S. 254, is inapplicable because he is not a public figure and, insofar as the article related to him, it did not concern a matter of public interest.

Plaintiff's considerable stature as a lawyer, author, lecturer, and participant in matters of public import undermine the validity of the assumption that he is not a "public figure" as that term has been used by the progeny of *New York Times*. Nevertheless, for purposes of decision we make that assumption and test the availability of the claim of privilege by the subject matter of the article. The question then is whether the article, taken as a whole, and more narrowly in its references to plaintiff, is of any *significant* public interest.[8]

Considering either the article's specific topic—the trial of a Chicago police officer for the crime of murder—or its broader theme—the possible existence of a nationwide conspiracy to discredit local police officers—it is clear that the district court was correct in holding that there is significant public interest in the subject matter of the article. Discussion and debate about matters of this character merit the kind of First Amendment protection that the Supreme Court described in *New York Times Co.* v. *Sullivan* and later cases extending its rationale to include not only comment on public officials, but public fig-

[8] With deliberation we have included the word "significant" in our statement of the question because we are convinced that areas of privacy remain beyond the coverage of the *New York Times'* protective shield. In our view mere public curiosity about private matters is not the kind of "public interest" that the standard contemplates. See *Rosenbloom* v. *Metromedia, Inc.*, 403 U.S. 29, 44 n. 12, 45 n. 13, 48 (opinion of Mr. Justice Brennan).

ures and public issues as well. See *Rosenbloom* v. *Metromedia, Inc.*, 403 U.S. 29, 47-52 (opinion of Mr. Justice Brennan).

It is less clear, however, that the false comments about the plaintiff are worthy of the same protection. It is one thing to omit the word "alleged" from an otherwise accurate comment on a newsworthy subject;[9] it is quite another to include a gratuitous and collateral remark about a participant in a public controversy. The omission, even if it makes the comment false, does not enlarge its subject matter beyond the area in which First Amendment protection is properly afforded. But the addition of an unnecessary and irrelevant comment about a private individual is not automatically protected simply because it is contained in an article dealing generally with an important subject. Otherwise a few introductory platitudes might be used as a justification for false and destructive invasions of the privacy of ordinary citizens. *Cf. Kois* v. *Wisconsin*, ... U.S. ....., 40 U.S.L.W. 3615 (June 26, 1972).

In this case, the alleged "Communist front" associations of the lawyer for the Nelson family were quite irrelevant to the question of Nuccio's guilt or innocence of the crime of murder. They were inserted in order to develop the thesis about a national conspiracy against the police. To the extent that these comments lent any support to that thesis, they were either false or unconvincing. Alhough more credible and respectable authors than Stang or Stanley have written on the same theme,[10] we may

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[9] See *Rosenbloom* v. *Metromedia*, 403 U.S. 29, 55 (opinion of Mr. Justice Brennan); *Time, Inc.* v. *Pape*, 401 U.S. 279.

[10] See, *e.g.*, Inbau, Behind Those "Police Brutality" Charges, a 1966 *Reader's Digest* article reproduced in the Supplemental Appendix at p. 117.

also assume that the article's basic thesis is false. Nevertheless, under the reasoning of *New York Times Co.* v. *Sullivan,* even a false statement of fact made in support of a false thesis is protected unless made with knowledge of its falsity or with reckless disregard of its truth or falsity. It would undermine the rule of that case to permit the actual falsity of a statement to determine whether or not its publisher is entitled to the benefit of the rule.

If, therefore, we put to one side the false character of the article and treat it as though its contents were entirely true, it cannot be denied that the comments about plaintiff were integral to its central thesis. They must be tested under the *New York Times* standard.

III.

There is no evidence that Stanley actually knew that Stang's article was false; defendant did not "deliberately publish falsehoods." The question is whether the publication was made recklessly. The Supreme Court has made two propositions abundantly clear. Both, as well as a third consideration which we shall mention, support the district court's appraisal of the issue.

First, the mere fact that a publisher fails to verify the accuracy of defamatory statements in an article submitted by an author whom he could reasonably assume to be trustworthy is not sufficient to establish a reckless disregard for the truth. On several occasions the Court has expressly stated that the record must reveal a "high degree of awareness of . . . probable falsity" before a

publisher may be found to have acted recklessly.[11] In this case there is no evidence that Stanley knew anything at all about plaintiff except what was contained in Stang's article.

Second, the Court has plainly stated that the evidence establishing reckless disregard for the truth must be clear and convincing, and that an appellate court has an independent obligation to make its own analysis of the record before a finding that a comment was reckless may be approved.[12] Unquestionably, in a close case the policy of encouraging free and uninhibited expression is to be preferred over the conflicting policy of deterring irresponsible defamatory comment. Apart from the failure to verify Stang's facts, and an apparent disposition to assume that a lawyer who could file a civil rights case

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[11] *St. Amant* v. *Thompson*, 390 U.S. 727, 731; *Beckley Newspapers Corp.* v. *Hanks*, 389 U.S. 81, 84-85; *Garrison* v. *Louisiana*, 379 U.S. 67, 74-75. In his opinion in *Curtis Publishing Co.* v. *Butts*, 388 U.S. 130, Mr. Justice Harlan stated the standard for plaintiffs who are not public figures as merely requiring ". . . a showing of highly unreasonable conduct constituting an extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers." *Id.* at 155. However, in that case, the publisher had been notified prior to publication, both by the plaintiff and by his daughter, that the material about to be printed was false. *Id.* at 161 n.23. Moreover, as we read the subsequent opinions, although Justices Stewart and Marshall, and perhaps Justice White, may have adopted Mr. Justice Harlan's less severe standard (see *Rosenbloom* v. *Metromedia, Inc.*, 403 U.S. 29, 57-62 (opinion of Mr. Justice White), 62-78 (opinion of Mr. Justice Harlan), 78-87 (opinion of Mr. Justice Marshall with whom Mr. Justice Stewart joined), at least the Chief Justice and Justices Douglas, Brennan and Blackmum have unequivocally rejected it. Thus, the majority of the present Justices who have spoken to the point would not relax the *New York Times* standard in a case not involving a public official.

[12] *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 285-286; *Rosenbloom* v. *Metromedia, Inc.*, 403 U.S. 29, 55 (opinion of Mr. Justice Brennan); *Beckley Newspapers Corp.* v. *Hanks*, 389 U.S. 81, 83.

against a policeman may well be a "Communist fronter," there is no evidence that Stanley acted recklessly within the Supreme Court's definition of that term. To assume that Stanley must have known, on the basis of information received from Stang over the telephone or from some other source, that the comments about plaintiff were false, would itself be reckless. Our examination of the record satisfies us that "'the proof presented to show actual malice lacks the convincing clarity which the constitutional standard demands. . . .' 376 U.S., at 285-286." *Beckley Newspapers Corp.* v. *Hanks*, 389 U.S. 81, 83, quoting from the *New York Times* case.[13]

Third, if the issue were doubtful, we would defer to the conclusion of the trial judge. Having heard the testimony and observed Stanley on the witness stand, and even though he expressed understandable concern about the wisdom of the rule he felt obligated to apply, he concluded unequivocally that the evidence did not meet the *New York Times Co.* v. *Sullivan* standard.[14]

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[13] One distinction which is lost in some of plaintiff's arguments should be kept in mind. "[I]ll will toward plaintiff, or bad motives, are not elements of the *New York Times* standard." *Rosenbloom* v. *Metromedia*, 403 U.S. 29, 52 n. 18 (opinion of Mr. Justice Brennan). Thus, the kind of malice which will, for example, defeat a conditional privilege in the traditional tort law of libel, will not satisfy the *New York Times* standard. However bad its motives, a publisher is protected by the First Amendment as long as the allegedly libelous statements were not made with knowledge of falsity or with reckless disregard of whether they were true or false.

[14] "THE COURT: I can say now, without any question and it will appear of record in the case, that on the basis of the evidence that I have heard, that if I—if I should hold, or some other court should hold, that he is a public figure, that so far as the rest of the evidence is concerned, I would direct a verdict on the question of malice, on the evidence that I have heard. I wouldn't even submit it to the jury." S.A. 88.

Finally, by reference to matters not in evidence, plaintiff in effect asks us to take judicial notice of a reckless disregard for the truth on the part of the John Birch Society and its affiliates.[15] Unquestionably, a judge's sym-

---

[15] Plaintiff makes three arguments that were not pressed below. (1) He contends that recklessness is established by the fact that representatives of the John Birch Society have previously referred to great Americans, such as President Eisenhower, as "Communists," and that certain of its procedures contemplate the deliberate use of propaganda that may well be inaccurate. This contention is unsupported by any evidence in the record. Plaintiff does argue that he was prevented from introducing all of his evidence on actual malice because the trial court had previously ruled—contrary to its reassessment of the situation at the time of the motion for judgment n.o.v.—that the *New York Times* standard did not apply. However, plaintiff did present evidence of malice (both the "constitutional" and the "ill will" type) to support his damage claim and no such evidence was excluded; at least he points to no occasion when he made an offer of proof of relevant evidence which was refused. Even if the references to President Eisenhower had been offered, such evidence would not meet the *New York Times* standard. Plaintiff does not contend that Stanley knew him or anything about him when the article from Stang was received. At most the "Eisenhower" evidence tends to prove that Stanley would be less disposed than another editor to question the author's characterization of plaintiff. (2) He contends that continued distribution of the April edition of *American Opinion* after this litigation was commenced establishes defendant's recklessness; however, defendant offered evidence for the purpose of proving a good faith post-complaint attempt to verify the charges, and plaintiff persuaded the court to exclude such evidence on the ground that ". . . anything that was done after the publication of the article [is] entirely irrelevant to these proceedings." S.A. 104. (3) Plaintiff seems to contend, on appeal, though he never so argued at trial, that since Stang was described as a "contributing editor" in later issues of the magazine, though not in the April 1969 issue, that defendant should be held liable on a *respondeat superior* doctrine for the malice of Stang. We do not find the later "contributing editor" characterization, in itself, sufficient to change the free-lance character of Stang's relationship with defendant. No other evidence of an employer-employee relationship was proffered. Thus, we also find no error in the trial court's refusal to order defendant to produce Stang for examination as an adverse witness.

pathetic reaction to the point of view expressed in an article which has been found to contain libelous matter may make it easier for him to afford a publisher First Amendment protection.[16] We cannot, however, apply a fundamenal protection in one fashion to the New York Times and Time Magazine and in another way to the John Birch Society.[17] Whether we are moved to applaud or to despise what is said, our duty to defend the right to speak remains the same.

The judgment is affirmed.

KILEY, *Circuit Judge*, concurring.

I concur. Judge Stevens has written a persuasive opinion. It is with considerable reluctance, however, that I concur. The reluctance is due to my fear that we may have in this opinion pushed through what I consider the outer limits of the First Amendment protection against liability for libelous statements and have further eroded the interest of non-"public figures" in their personal privacy.

Gertz, a reputable attorney, is virtually called a Communist in an article written by Stang and adopted by Stanley without the latter making any inquiry on his own as to whether there was a reasonable basis for calling Gertz a Communist.

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[16] See Kalven, The New York Times Case; a Note on "the Central Meaning of the First Amendment," 1964 Sup. Ct. Rev. 191, 200.

[17] See *Police Department of the City of Chicago* v. *Mosley*, ... U.S. ....., 40 U.S.L.W. 4877, 4878 (June 26, 1972).

This is not the *Rosenbloom* case, 403 U.S. 29 (1971), Rosenbloom was the publisher of "nudist magazine," and the news broadcast by defendant implicitly referred to Rosenbloom as a "smut distributor" and a "girly-peddler." The involvement of the non-"public figure" with an issue of public interest is a consideration which moved the Supreme Court to apply the *New York Times* rule in *Rosenbloom*. I cannot find that Gertz was closely involved with the asserted national Communist conspiracy, as Rosenbloom was with the "smut literature racket."

Yet Judge Stevens shows that the trend of the Supreme Court decisions requires "in this close case" the conclusion that the district court did not err in entering the judgment for defendant, notwithstanding the verdict for Gertz.

A true Copy:

Teste:

.....

Clerk of the United States Court of Appeals for the Seventh Circuit.

APPENDIX "B"

Opinion of the U. S. District Court

In this motion for judgment notwithstanding the verdict, or in the alternative, for a new trial, defendant Robert Welch, Inc. seeks to reverse the verdict of a jury which found him responsible for the libel *per se*[1] of plaintiff Elmer Gertz. Damages of $50,000 were awarded.

The libel was published as the lead article in the defendant's monthly magazine *American Opinion* under the title "Frame-Up" with a sub-title "Richard Nuccio and the War on Police". Reprints of the article were made available immediately and were widely circulated. Nuccio was a Chicago policeman who was charged with the murder of Ronald Nelson, and the article dealt with Nuccio's murder trial and subsequent conviction. Gertz, an attorney, had been retained by the Nelson family. He represented them at the deceased's inquest, and he filed suit in their behalf in federal court. At page 12 of the 19 page article Gertz is labeled a "Leninist . . . who now turns up as lawyer for the Nelsons," and at page 17 he is described as a "Communist fronter".

One of the principal defenses at trial, and the basis for this motion, was that Gertz was a "public official" within the meaning of *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 279-280 (1964), or more properly, that he

---

[1] In denying defendant's motion to dismiss, it was held that the complaint sufficiently averred a libel *per se* under Illinois law, and not merely a libel *per quod*. *Gertz* v. *Robert Welch, Inc.*, 306 F. Supp. 310 (N.D. Ill. 1969).

was a "public figure" within the meaning of *Curtis Publishing Co.* v. *Butts*, 388 U.S. 130, 153-155 (1967), thus precluding a recovery of damages for a defamatory falsehood unless actual malice is shown. In denying cross motions for summary judgment, the court refused to hold as a matter of law that defendant had published with actual malice. Memorandum Opinion of September 16, 1970. Instead, factual issues raised in the affidavits required that the matter be submitted to a jury. F.R.Civ.P. 56(c).

At trial, Gertz testified as to his stature and reputation in the community. He is a prominent attorney in Chicago, having represented clients who sometimes command a wide following in the press and media. He has written books, articles and reviews which have enjoyed wide circulation. He has appeared frequently on radio and television, and has delivered numerous speeches. And he has long been involved in civic affairs.

Despite the above, the court held, in effect, that Gertz was not a public figure. In instructing the jury, the court determined that the publication in question was libelous *per se*. All issues were withdrawn from the jury except the proper measure of damages.

A closer examination of the article shows that its theme was more general and far reaching than just the trial of one Chicago policeman for murder. Instead, it painted the picture of a conspiratorial war being waged by the Communists against the police in general.[3] Caught up in the

[3] Immediately following the reprint of the article is a list of additional readings on the subject of the war against police, published by defendant. One of the items is entitled "The Communist Attack On The U.S. Police."

web of the alleged conspiracy, aside from Gertz, was such a disparate cast of characters as the Lake View Citizens Council, the Walker Report, a Roman Catholic priest, and the Chicago *Seed* (an underground newspaper). In fact, although Gertz's picture was displayed in the body of the article, he did not play a very prominent role in the article's exposé of the purported war on police.

At trial, Scott Stanley, Jr., the Managing Editor of *American Opinion,* testified that he had commissioned Alan Stang, a free-lance writer, to write the article. Stang had written for defendant in the past, and Stanley had always found him accurate. Stanley had never had cause to question the contents of any article that Stang had written, and to his knowledge there had not been any lawsuits arising out of Stang's articles. Relying on what he observed to be Stang's past history of accuracy, Stanley did not check the accuracy of "Frame-Up" personally.[3] While it may be that the failure to check the accuracy of the article was negligent, Stanley clearly did not act with actual malice or with reckless disregard for the truth. See *New York Times Co.* v. *Sullivan,* 376 U.S. at 287-288.

Plaintiff having failed to establish actual malice on the part of defendant, the issue presented in this motion is whether the court properly concluded that Gertz was not a public figure. If the conclusion was proper, then the award of $50,000 by the jury was not constitutionally impermissible. However, if the court erred in holding that Gertz was not a public figure, then under the rule in

---

[3] He had never heard of Gertz prior to reading the article, and had no reason to doubt the veracity of what Stang wrote about Gertz.

N. Y. Times v. *Sullivan, supra* at 279-280, and *Curtis Publishing Co.* v. *Butts, supra* at 155, the article would be privileged under the First and Fourteenth Amendments, and the award of damages therefor would have been improper.

The issue is not as simple, of course, as the question of whether Gertz is a public figure. The penumbra of material protected by the guarantee of freedom of speech has been extended to include matters of public interest, whether or not public officials or public figures are involved.

> "One need only pick up any newspaper or magazine to comprehend the vast range of published matter which exposes persons to public view, both private citizens and public officials. Exposure of the self to others in varying degrees is a concomitant of life in a civilized community. The risk of this exposure is an essential incident of life in a society which places a primary value on freedom of speech and press." *Time, Inc.* v. *Hill,* 385 U.S. 374, 388 (1967).

The rationale for affording First Amendment protection to matters of public interest, as implied by *Hill, supra,* is that our system of government places great value of society's open discussion of not only public officials (*Sullivan*) and public figures (*Butts*), but also matters of public interest (*Hill*). A person alegedly defamed by matter pertaining to the public interest must satisfy a heavy burden, i.e. a showing of actual malice, in order to recover therefor. The rationale of *N. Y. Times* v. *Hill* (sic) has been applied to several decisions of the Courts of Appeal recently, all of which extend the guarantee of free speech to matters of public interest.

For instance, a private individual's arrest for the sale of allegedly obscene material has been held to be a matter of public interest. *Rosenbloom* v. *Metromedia, Inc.*, 415 F. 2d 892, 894-896 (3d Cir. 1969), *cert. granted*, 397 U.S. 904 (1970). A picture of a lawyer eating lunch with reputed gangsters has been found to be of public interest. *Wasserman* v. *Time, Inc.*, 424 F. 2d 920, 922 (D.C. Cir. 1970), *cert. denied*, 398 U.S. 940 (1970); *Time, Inc.* v. *Ragano*, 427 F. 2d 219, 221 (5th Cir. 1970). To the same effect are stories concerning the administration of public health, *United Medical Laboratories* v. *Columbia Broadcasting System*, 404 F. 2d 706, 711-712 (9th Cir. 1968), *cert. denied*, 394 U.S. 921 (1969), and the influence of a reputed gambler in the election of the premier of the Bahamas, *Time, Inc.* v. *McLaney*, 406 F. 2d 565, 573 (5th Cir. 1969), *cert. denied*, 395 U.S. 922 (1969). Finally, it has been held that the condition of a hotel serving guests at a national golf tournament is a matter of public interest. *Bon Air Hotel, Inc.* v. *Time, Inc.*, 426 F. 2d 858, 860-862 (5th Cir. 1970). See also, *Farnsworth* v. *Tribune Co.*, 43 Ill. 2d 286, 290-292, 253 N.E. 2d 408 (1969).

By analogy to the above cases, and to those cited in *Bon Air Hotel, Inc.* v. *Time, Inc.*, *supra* at 861, n. 4, I think that the subject matter of "Frame-Up" was clearly one of public interest protected by the First and Fourteenth Amendments. A Chicago policeman's killing of a criminal suspect, and the policeman's subsequent indictment for murder at a time when the police generally were the subject of attacks within the community, commanded wide public attention and interest. By representing the victim's family in litigation brought against the policeman, Gertz thrust himself into the vortex of this im-

portant public controversy. *Curtis Publishing Co.* v. *Butts, supra* at 155. In affording First Amendment protection to defendant's publication, I reiterate that Gertz played a small part in the vast sweep of the whole article. What his court concerns itself with primarily is the public's right to become informed on a matter of public interest, rather than with any right to know about persons who have injected themselves into the limelight on that matter. See *United Medical Laboratories* v. *Columbia Broadcasting System, supra* at 712. The penumbra of First Amendment protection falls equally on references to Gertz, the Lake View Citizens Council, the policeman charged with murder, and the Chicago *Seed*.

Having already concluded that there was not sufficient evidence presented at trial to support a finding of actual malice or reckless disregard for the truth, judgment notwithstanding the verdict should be entered for the defendant. *N. Y. Times* v. *Sullivan,* 376 U.S. at 286-288; F.R.Civ.P. §50(b). The motion for a new trial is conditionally denied, since no jury could reasonably find that defendant acted with actual malice. F.R.Civ.P. §50(c); *cf. Neely* v. *Eby Construction Co.,* 386 U.S. 317, 322 (1967), *reh. denied,* 386 U.S. 1027 (1967).

Accordingly, the verdict for plaintiff is set aside and defendant's motion for judgment notwithstanding the verdict is granted. F.R.Civ.P. §50(b).

Enter:

/s/ Bernard M. Decker
United States District Judge.

Dated: December 8, 1970

APPENDIX "C"

Order of the U. S. Court of Appeals
September 7, 1972

On consideration of the petition for rehearing and suggestion that it be heard *en banc* filed in the above-entitled cause, no judge in active service having requested a vote thereon, nor any judge voted to grant the suggestion, and all members of the panel having voted to deny a rehearing,

It Is Ordered that the petition for a rehearing in the above-entitled cause be and the same is hereby denied.

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Supreme Court, U. S.
FILED
JAN 15 1973
MICHAEL RODAK, JR., CLERK

In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

No. 72-617

ELMER GERTZ,
Petitioner,

VERSUS

ROBERT WELCH, INC.,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

CLYDE J. WATTS
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January, 1973

UTTERBACK TYPESETTING CO., 519 W. CALIF., OKLAHOMA CITY. PH. 235-0030

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RESPONDENT'S BRIEF IN OPPOSITION

To the Justices of The Supreme Court of the United States:

The Respondent, ROBERT WELCH, INC., respectfully prays that the Petition for Writ of Certiorari filed herein be denied.

OPINIONS BELOW

The opinion of the District Court (Petitioner's Appendix B) is reported at 322 F.Supp. 997. The opinion of the Court of Appeals for the Seventh Circuit (Petitioner's Appendix A) is not yet officially reported. The Order denying Appellant's Petition for Rehearing (Petitioner's Appendix C) is not reported.

QUESTIONS PRESENTED

The Petitioner has briefed three questions in his Petition for Writ of Certiorari:

1. Was the Petitioner spoken of in a "public capacity"?
2. Was the Petitioner denied a fair trial and due process?
3. Did the taxation of costs against the Petitioner by the Court of Appeals deprive him of due process?

STATEMENT

The facts of the case are stated fully in the decisions of the District Court (Petitioner's Appendix B, at page 15a) and the Court of Appeals (Petitioner's Appendix A at page 1a); and Respondent respectfully suggests reference thereto, for an objective summary of the actual facts, rather than the distorted "Statement of the Case" presented in the Petition for Certiorari with statements, inferences and innuendos from outside the record obviously designed to prejudice the Court.

ARGUMENT

The Petitioner contends that he was not spoken of in a "public capacity", which is a new issue not presented to the Court of Appeals. There, the Petitioner's primary contention was that he was not a public figure, and that, insofar as the alleged libelous article concerned him, it was not a matter of public interest and that the *New York Times Co.*

v. *Sullivan*, 376 U.S. 254 standards were not applicable to him. However, the Court of Appeals recognized:

> "Plaintiff's considerable stature as a lawyer, author, lecturer and participant in matters of public import undermined the validity of the assumption that he is not a 'public figure' as that term has been used by the progeny of *New York Times*. * * *"

The trial court found, and the Court of Appeals affirmed the decision, that the article published in *American Opinion* magazine, "Frame-up, Richard Nuccio and the War on Police" was an article of significant public interest and deserving of First Amendment protection. In *Rosenbloom* v. *Metromedia, Inc.*, 403 U.S. 29, 43, this Honorable Court discussed First Amendment application to matters of public or general concern and held that if the alleged libel concerned a matter of general public interest then malice as defined in *New York Times* v. *Sullivan*, 376 U.S. 254[1], must be shown by the plaintiff.

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[1] "If a matter is a subject of public or general interests, it cannot suddenly become less so merely because a private individual is involved, or because in some sense the individual did not 'voluntarily' choose to become involved. The public's primary interest is in the event; the public focus is on the conduct of the participant and the content, effect, and significants of the conduct, not the participant's prior anonymity or notoriety. The present case illustrates the point. The community has a vital interest in the proper enforcement of its criminal laws, particularly in an area such as obscenity where a number of highly important values are potentially in conflict: The public has an interest both in saying that the criminal law is adequately enforced and in assuring that the law is not used unconstitutionally to suppress free expression. Whether the person involved is a famous large-scale magazine distributor or a 'private' businessman running a corner newsstand has no relevance in ascertaining whether the public has an interest in the issue. *We honor the commitment to robust debate on public issues which is embodied in the first amendment by extending constitutional protection to all discussion and communication involving matters of public or general concern, without regard to whether the persons involved are famous or anonymous.*" (Emphasis supplied.)

Certainly, the alleged murder of an individual citizen by a policeman, a public servant, is of general public interest. The act of the policeman is the act of society and all law abiding citizens should be concerned. The Petitioner, while representing the Nelson Family privately, attended the coroner's inquest, which was a public hearing to determin whether or not a public statute had been violated and questioned Officer Nuccio as to his participation in the alleged murderous act. The trial court stated (Petitioner's Appendix B, page 19a):

> "* * * By representing the victim's family in litigation brought against the policeman, Gertz thrust himself into the vortex of this important public controversy. * * *"

Although Gertz was not the central character of the alleged libelous article, he was alleged to have been involved in the conspiracy to frame Chicago policemen.

Thus, the article published by the Respondent was of "public or general interest" and entitled to the shield of the First Amendment.

The Petitioner contends that he was denied a fair trial and due process because of the trial court's failure to allow him to introduce sufficient evidence of malice to overcome the First Amendment protection which the court held the Respondent entitled to claim.

This same contention by the Petitioner was rejected by the Court of Appeals, with an objective and sound analysis, as follows:

> "Finally, by reference to matters not in evidence, plaintiff in effect asks us to take judicial notice of a

reckless disregard for the truth on the part of the John Birch Society and its affiliates.[15] Unquestionably, a judge's sympathetic reaction to the point of view expressed in an article which has been found to contain libelous matter may make it easier for him to afford a publisher First Amendment Protection. We

---

[15]"Plaintiff makes three arguments that were not pressed below. (1) He contends that recklessness is established by the fact that representatives of the John Birch Society have previously referred to great Americans, such as President Eisenhower, as 'Communists,' and that certain of its procedures contemplate the deliberate use of propaganda that may well be inaccurate. This contention is unsupported by any evidence in the record. Plaintiff does argue that he was prevented from introducing all of his evidence on actual malice because the trial court had previously ruled—contrary to its reassessment of the situation at the time of the motion for judgment n.o.v.—that the *New York Times* standard did not apply. However, plaintiff did present evidence of malice (both the 'constitutional' and the 'ill will' type) to support his damage claim and no such evidence was excluded; at least he points to no occasion when he made an offer of proof of relevant evidence which was refused. Even if the references to President Eisenhower had been offered, such evidence would not meet the *New York Times* standard. Plaintiff does not contend that Stanley knew him or anything about him when the article from Stang was received. At most the 'Eisenhower' evidence tends to prove that Stanley would be less disposed than another editor to question the author's characterization of plaintiff. (2) He contends that continued distribution of the April edition of *American Opinion* after this litigation was commenced establishes defendant's recklessness; however, defendant offered evidence for the purposes of proving a good faith post-complaint attempt to verify the charges, and plaintiff persuaded the court to exclude such evidence on the ground that '. . . anything that was done after the publication of the article (is) entirely irrelevant to these proceedings.' S.A. 104. (3) Plaintiff seems to contend, on appeal, though he never so argued at trial, that since Stang was described as a 'contributing editor' in later issues of the magazine, though not in the April 1969 issue, that defendant should be held liable on a *respondent superior* doctrine for the malice of Stang. We do not find the later 'contributing editor' characterization in itself, sufficient to change the free-lance character of Stang's relationship with defendant. No other evidence of an employer-employee relationship was proffered. Thus, we also find no error in the trial court's refusal to order defendant to produce Stang for examination as an adverse witness."

> *cannot,* however, *apply a fundamental protection in one fashion to the New York Times and Time Magazine and in another way to the John Birch Society.* Whether we are moved to applaud or to despise what is said, our duty to defend the right to speak remains the same.
>
> "The judgment is affirmed."

It is abundantly clear that the Petitioner's claimed denial of a fair trial and due process is unsupported by the record below.

Further, the Petitioner alleges that he was denied due process because he was ordered by the Court of Appeals to pay the costs which amounted to $2,021.30. The Petitioner also states that the decision of the Court of Appeals was close, however, it should be noted that the decision of the Court of Appeals was 3-0 for the Appellee-Respondent herein.

Rule 39(a), Federal Rules of Appellate Procedure, provides:

> "COSTS
>
> "(a) To Whom Allowed. Except as otherwise provided by law, if an appeal is dismissed, costs shall be taxed against the appellant unless otherwise agreed by the parties or ordered by the court; if a judgment is affirmed, costs shall be taxed against the appellant unless otherwise ordered; *if a judgment is affirmed costs shall be taxed against the appellant unless otherwise ordered;* * * *."

The United States Court of Appeals for the Seventh Circuit properly applied the Rule 39(a) as it affirmed the decision of the trial court.

For the foregoing reasons, it is respectfully submitted that this Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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January, 1973

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Supreme Court, U. S.
FILED
JAN 20 1973
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

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ELMER GERTZ,

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vs.

ROBERT WELCH, INC.,

Respondent.

PETITIONER'S REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

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PETITIONER'S REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

Respondent's Brief in Opposition to Petitioner's Petition for Certiorari is tantamount to no opposition at all, as Respondent has set forth no sufficient reasons why this Court should not grant the Writ. Were it not for the fact that Respondent has made certain material misstatements, Petitioner would rely solely upon his Petition.

Respondent's first basic misstatement appears in the very first line of its Argument, when it states that Petitioner's contention that he was not spoken of in a "public capacity" was an issue not presented to the Court of

Appeals. This is simply untrue. The Court did not even discuss this issue in its opinion, which is one of the reasons that Petitioner seeks Certiorari. The issue has not been explored adequately in any opinion which Petitioner has been able to discover, and should be resolved by this Court in order to define further the constitutional rights of parties in such circumstances. Petitioner raised and argued this issue most vigorously in his brief before the Court of Appeals. The contentions urged by Petitioner in that forum, which were not discussed there, are further reason for the granting of the Writ herein. We said there, and urge before this Court, the following:

> ". . . the article involved herein does not refer to plaintiff in any public capacity, but only in his capacity as a private attorney. That is made clear in the article, which refers to him as the attorney for the parents of Ronald Nelson. It has been held repeatedly and without exception that in order for a defendant to avail himself of constitutional protection in a libel suit, his statement about the plaintiff must be in relation to his public activities. *Belli* v. *Orlando Daily Newspapers*, 389 F. 2d 579 (5th Cir. 1967), cert. den. 393 U.S. 825; *Stearn* v. *MacLean-Hunter Ltd.*, 76, 78 (S.D.N.Y. 1969)."
>
> • • • • •
>
> "The trial court held that the subject matter of the article was a matter of public interest and concern, which was protected by the First and Fourteenth Amendments. He found that plaintiff 'played a small part in the vast sweep of the whole article.' Yet, he found that plaintiff was thereby required to prove actual malice in the constitutional sense in order to recover. The trial court based its decision in part upon the decision of the Supreme Court in *Time, Inc.* v. *Hill*, 384 U.S. 374, 87 S. Ct. 534 (1967), where

it was held that a private individual could not bring an invasion of privacy action against a publisher who was guilty of no more than innnocent or negligent misstatement. However, the Court expressly declined to rule upon the issues presented in this case, stating:

> 'Were this a libel action, the distinction which has been suggested between the relative opportunities of the public official and the private individual to rebut defamatory charges might be germane. And the additional state interest in the protection of the individual against damage to his reputation would be involved. . . . But the question whether the same standard should be applicable both to persons voluntarily and involuntarily thrust into the public limelight is not here before us.' Id. at 391, 87 S. Ct. at 543-44.

"Thus, by merely applying the *Hill* case without an analysis of the underlying policies, the Court was led astray. For, to hold, that the mere fact that a subject matter is deemed newsworthy enough to be printed by the defendant cannot in fact be the sole determining factor. This would allow each defendant to manufacture his own defense, which is directly contrary to the policies which the trial court recognized in holding the article libelous per se. The state does indeed have an interest in protecting the reputation of its citizens, and its attorneys no less. Yet, no recognition was given to this policy. The subject matter must be a legitimate matter of public interest, not something of only slight interest to the public. *Cepeda* v. *Cowles Magazine and Broadcasting, Inc.*, 392 F. 2d 417, 419 (9th Cir. 1968), cert. den. 393 U.S. 840.

"In recognition of this policy the courts have evolved certain distinctive categories of what is of legitimate public interest and concern, such as the public acts and qualifications of officials and candi-

dates, the management of educational, charitable and religious institutions, public offerings of a literary, artistic and scientific nature, and public offerings of products for use and consumption. *Afro-American Publishing Company* v. *Jaffe*, 366 F. 2d 649, 656 (D.C. Cir. 1966).

"The fundamental error of the trial court was in failing to recognize that the policies which led to the application of constitutional protections to matters of public interest is a flexible tool to be used in accordance with the legitimate policies behind the first amendment. However, conceding that an article might of itself deal with a matter of public interest and concern, this does not mean that every person mentioned in that article is governed by the same rules. To so hold would be to fall into that old trap which has been condemned again and again of exalting form over substance. Certainly different persons mentioned in the same article may be in different categories and subject to different rules. Clearly the assistant state's attorneys mentioned in the article are public officials and fall within the ambit of *New York Times*. Perhaps, some of those mentioned in the article made public speeches and pronouncements of the subject matter thereof, thereby thrusting themselves into the vortex as did General Walker. But, this does not mean that the mention of every person in an article dealing generally with a matter of public interest must thereby prove actual malice in the constitutional sense. To so hold would defeat the legitimate policy of protecting one who has not sought attack and who cannot defend himself. Such ruling would allow an unscrupulous publisher to bring in a person not legitimately connected with the subject matter of the article in general and defame him with a great measure of impunity in the guise of serving the greater public good. Such a result was

never intended and would be a perversion of a laudable principle.

"This is what occurred here. The gist of defendant's article was that the police in this country are the subject of an attempt to discredit them by Communists, and that the criminal indictment and conviction of Nuccio was the result of such conspiracy. However, plaintiff had absolutely nothing to do with the criminal proceedings, as attested to by Nuccio's attorney and even by defendant itself. He represented private clients in a circumspect and inconspicuous manner. This was no legitimate part of the article or the subject matter thereof.

"When does a matter become a public issue of such nature as to bar a defamed plaintiff from recovery short of actual malice or gross recklessness? Is it when any extremist of the right or left or a mere zealot or crackpot declares it to be such, whether or not he is fair and reasonable? And how deeply must the plaintiff be involved in the matter in order to prevent recovery on his part, assuming absence of actual malice or gross recklessness? If defendant's theory is adopted, all of us, including reputable lawyers, are at the mercy of those who lightly and without cause defame us.

"In the situations in which recovery has been barred by reason of the presence of public issues, such as *Farnsworth* v. *Tribune Co.*, 43 Ill. 20, 286, the plaintiff himself has been a principal participant, the very one in the center of the stage. If it were Nuccio who claimed he was defamed, it might be said that by reason of his being charged with a crime, he was a public figure involved in a public matter. Plaintiff is in no analogous position. Even Nuccio's own attorney said that plaintiff was not involved in any way and was certainly not a part of any conspiracy.

"When a person or corporation is at the center of an article, controversy or investigation, the result of which is of interest or concern to the public, there are strong policy considerations in favor of requiring and showing of actual malice in the constitutional sense. If it were otherwise, the right of the populace to obtain information would be effectively thwarted. This has been the basis of the cases relied upon by the trial court in granting judgment notwithstanding the verdict. The public indeed has a right to know about persons who have been arrested. *Rosenbloom* v. *Metromedia, Inc.*, 415 F. 2d 892, 894-96 (3d Cir. 1969), *cert. granted*, 397 U.S. 904 (1970); those who consort with reputed gangsters, *Wasserman* v. *Time, Inc.*, 424 F. 2d 920, 922 (D.C. Cir. 1970), *cert. denied*, 398 U.S. 940 (1970), *Time, Inc.* v. *Ragano*, 427 F. 2d 219, 221 (5th Cir. 1970); those who delve into elections in foreign countries, *Time, Inc.* v. *McLaney*, 406 F. 2d 565, 573 (5th Cir. 1969), *cert. denied*, 395 U.S. 922 (1969); those who deal in public health, *United Medical Laboratories* v. *Columbia Broadcasting System*, 404 F. 2d 706, 711-12 (9th Cir. 1968), *cert. denied*, 394 U.S. 921 (1969), *Farnsworth* v. *Tribune Co.*, 43 Ill. 2d 286, 290-92, 253 N.E. 2d 408 (1969); and those who hold themselves out to accommodate the public, *Bon Air Hotel, Inc.* v. *Time, Inc.*, 426 F. 2d 858, 860-62 (5th Cir. 1970).

"The same policies most emphatically do not, however, allow a publisher to drag an innocent third party, who is not at the center of the subject matter of an article, into a controversy for the mere purpose of defaming him as was done here. Plaintiff was not being spoken of regarding the way in which he handled a case or represented a client, but he was spoken of as a Communist, a Marxist and a Leninist, completely divorced from anything else. What legiti-

mate public purpose does such a statement serve? If it is true, then defendant has his complete defense.

"Of great importance is the fact that the trial court did in fact allow the jury to consider defendant's defense of public issue. Defendant's counsel was permitted to argue in his closing statement that there were public issues with respect to Nuccio and the police and that what defendant wrote as to plaintiff should be considered fair comment. If the jury believed this argument, they were free to decide in favor of defendant. This they did not do because there was no support in the evidence for this position. Hence the court should not have granted defendant's post-trial motion."

Secondly, Respondent contends that Petitioner's due process contentions were disposed of by the Court of Appeals. A reading of the opinion of the Court of Appeals, which Respondent quotes, in part, in its Brief in Opposition, makes it clear that the Court did not understand the issue which Petitioner raised there. As is set forth in the Petition for Certiorari, the District Court informed Plaintiff that he was not required to prove actual malice, either in the constitutional, or in any other sense, as the Court regarded the article as libelous *per se*, and so instructed the jury. Then, only after the jury had returned a verdict in favor of plaintiff, the District Court did an about face and stated that plaintiff was required to prove actual malice in the constitutional sense, which, the Court said, he had not done. The Court failed, at this point, having changed its viewpoint, to give plaintiff opportunity to prove malice; and this basic denial of due process was confirmed, in effect, by the Court of Appeals.

The issue which Petitioner urged upon the Court of Appeals, and renews here, is that, as a matter of fair play and due process, he must be given an opportunity to present evidence which would satisfy that burden of proof. To this very date, he has not been given an opportunity to do so. The matters set forth before the Court of Appeals were not for the purpose of convincing the Court of Appeals "to take judicial notice of a reckless disregard for the truth on the part of the John Birch Society and its affiliates", as the Court of Appeals mistakenly held, but was for the purpose of giving that Court an indication of the kind of evidence which was available to Petitioner to be used to prove actual malice should a retrial become necessary. For example, Respondent states in its brief here that Petitioner was part of a conspiracy to frame a police officer although it was admitted at trial that this was untrue. *It must be reiterated that Petitioner has thus far been foreclosed from introducing this kind of evidence, and has not been given an opportunity to prove malice in the constitutional sense, if that is in fact required.*

It is a deprivation of due process to hold, *ex post facto*, as did the Court of Appeals and the District Court, that plaintiff must prove this kind of malice and then deprive him of an opportunity to do so, as was also done.

Finally, both the District Court and the Court of Appeals have ignored the evidence of actual malice which Plaintiff, only fortuitously, did introduce at the trial. This evidence is set forth at pages 21 through 26 of Petitioner's Petition for Writ of Certiorari, and the Court is referred thereto. It should be noted particularly

that defendant distributed the defamatory publication for almost a year after suit was filed.

This Court has not defined extensively what kind of evidence is sufficient to present a *prima facie* case of actual malice. This case presents an admirable vehicle for a clarification of the law. Public policy requires that this Court delve into the special areas presented by this case.

May an extremist publication make it a practice to make irresponsible statements and then avoid consideration of those statements in a determination of actual malice? Should not a publisher be required to vouch for and justify its outlandish and continually distorted attacks? Should not such a tendency be considered by a jury in determining whether such publisher is acting in bad faith and with actual malice?

Such a question and the evidence presented by plaintiff should be explored and considered by this Court. We are not dealing with suppression of opinion in any manner. We are dealing with the right of a private citizen to seek vindication for injury done him wherein all parties are given an opportunity to present the facts to a court of law in a fair setting. Plaintiff has never had that opportunity constitutionally. It should not be denied him.

Private persons such as Petitioner have no other forum in which to defend and vindicate themselves. They have no access to public print, as does a publisher owning its own magazine with full ability to print what it desires at will.

CONCLUSION.

Petitioner asks this Court to issue its Writ of Certiorari to consider important issues which have not been explored. The determination of these issues is likely to have far-reaching consequences as to the extent to which attorneys will feel safe in representing the interests of clients. For the good of society, not only must the press be kept free to discuss important matters, but others, particularly lawyers, must be allowed to remain free to act without being placed in such a position that they may be destroyed without an opportunity to respond in an orderly and constructive manner.

WHEREFORE, Petitioner prays that this Court's Writ of Certiorari issue and that the judgment below be reversed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-617

ELMER GERTZ,

Petitioner,

vs.

ROBERT WELCH, INC.,

Respondent.

BRIEF OF PETITIONER ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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OPINIONS BELOW.

The opinion of the Court of Appeals is as yet unreported. The opinion of the District Court is reported at 322 F. Supp. 997. The order denying Plaintiff's Petition for Rehearing in the Court of Appeals is unreported. The various opinions and orders are set forth in the appendices to the petition for writ of certiorari.

JURISDICTION.

The judgment of the Court of Appeals for the Seventh Circuit was entered on August 1, 1972. A petition for rehearing with a suggestion for rehearing en banc was filed on August 15, 1972, and denied on September 7, 1972. The Petition for Certiorari herein was filed and docketed in this Court on October 20, 1972. This Court granted the Petition for Certiorari on February 20, 1973. The jurisdiction of this Court rests on 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED.

First Amendment to the United States Constitution:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Fourth Amendment to the United States Constitution:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Fifth Amendment to the United States Constitution:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Fourteenth Amendment to the United States Constitution:

> Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

QUESTIONS PRESENTED.

1. Whether petitioner, who was referred to and treated in an admittedly defamatory article as a private attorney, was a public figure within the requirements of the First Amendment?

2. Whether an article alleging a Communist conspiracy to harass the police, with no evidentiary support therefor,

is a matter of such public interest and importance as to require anyone mentioned therein, however peripherally or slightly (as was petitioner), to prove actual malice in order to recover for libel?

3. Whether petitioner was denied due process of law as a result of being precluded by the court from introducing evidence of actual malice?

4. Where the court states that, in this case, the law limiting recovery in libel has been narrowed, for the first time, to the greatest permissible extent, is it a violation of due process to tax thousands of dollars in costs against and admittedly defamed attorney, in light of the discretion of the court in assessing costs? (Argument in petition for writ of certiorari incorporated herein.)

STATEMENT OF THE CASE.

Petitioner, Elmer Gertz, is, and has been for over 40 years, an attorney licensed to practice before the courts of the State of Illinois, both local and federal, as well as in several other states and this Court. (Tr. I 74) At all times he has enjoyed a high reputation, both as an attorney and as a citizen of the United States. (Tr. I 20, 68, 169, 173) During this period of time he has written reviews, articles and books. He has spoken in public and has been a member and officer of various legal and community organizations. (Tr. I 76) Largely because of his preoccupation with his law practice, he was much less active than usual in community organizations, public appearances and writing in the months immediately preceding the publication of re-

spondent's article and the pamphlet reprint thereof, the subjects of this proceeding. Prior to the publication of that article in April of 1969, he had never held or run for any public office, or held any position from which he had received any remuneration from the government. (Tr. I 94)

In June, 1968, a young man named Ronald Nelson was shot and killed by Richard Nuccio, a police officer of the City of Chicago. Plaintiff was retained as a private attorney for the family of the deceased youth to represent them in private civil suits brought against the police officer in the Circuit Court of Cook County and the United States District Court for the Northern District of Illinois. (Tr. I 70-71) At no time did petitioner ever make any public statements of any kind in regard to these cases, nor was he ever publicly quoted as to Nuccio or the cases. (Tr. I 71) While some newspaper articles appeared regarding the fact that Officer Nuccio had been criminally tried and convicted of murder, none of them referred to petitioner, with the exception of one or two very short articles which merely stated passingly that he had filed civil suits against Nuccio on behalf of Ronald Nelson's parents. (Tr. I 155)

In March, 1969, the April issue of "American Opinion", published by respondent, appeared on the newstands across the country. It contained as its lead article, "Frame up, Richard Nuccio and the War on Police." This article contained several false and defamatory statements of and concerning petitioner, among which are the following:

p. 5—

"The file on Elmer Gertz in Chicago Police Intelligence takes a big, Irish cop to lift. According to the Communist *Worker* of December 8, 1964, he has signed a petition to abolish the House Committee on Un-

American Activities. On May 12, 1966, he sponsored another such petition, published by the Illinois division of the American Civil Liberties Union—founded by Harry F. Ward, one of the top Communists in the United States. Gertz also was a pallbearer for Jack Ruby, the 'lone fanatic' who killed the 'lone fanatic' who killed the President of the United States. He has been an official of the Marxist League for Industrial Democracy, originally known as the Intercollegiate Socialist Society, which has advocated the violent seizure of our government."

pp. 5-6—

"The Communist parade in April included the usual Communist violence. Apparently, the traitors were practicing for what they planned to do in August. And just as the phony Walker Commission and its *Walker Report* followed the terrorism in August, so a Commission and a report called *Dissent and Disorder* followed the terrorism in April, financed by the Roger Baldwin Foundation of Communist Harry Ward's A.C.L.U. After an 'impatrial investigation,' the A.C.L.U.'s Commission ridiculed 'the inaccurate impression that the April 27 event was a left wing affair'; exonerated the Communist Chicago Peace Council, which ran it; and naturally blamed the violence the Communists caused on the Chicago police: 'On April 27, at the peace parade of the Chicago Peace Council, the police badly mishandled their task. Brutalizing demonstrators without provocation, they failed to live up to that difficult professionalism which we demand.'"

"And the Chief Counsel for the Commission which committed *Dissent and Disorder* was the same Elmer Gertz who now turns up as lawyer for the Nelsons in the attack on Officer Nuccio."

"In fact, the only thing Chicagoans need to know about Gertz is that he is one of the original officers, and has been Vice President of the Communist National Lawyers Guild—which has been described by the House Committee on Un-American Activities as 'one of the foremost legal bulwarks of the Communist Party'—and which probably did more than any other outfit to plan the Communist attack on the Chicago police during the 1968 Democrat Convention."

p. 9—

Below a photograph of Elmer Gertz there appears the following: "Elmer Gertz of Red Guild harasses Nuccio."

p. 10—

"Like millions of other Americans, he was watching an organized attempt to discredit our local police—organized primarily by the Communist National Lawyers Guild, preeminent in which is the same Elmer Gertz who now appears as the Nelsons' lawyer."

p. 12—

"The C.P.C., as you will recall, is the Communist outfit headed by a Communist and defended by Leninist Elmer Gertz, who now turns up as lawyer for the Nelsons."

p. 17—

"Two Chicago Assistant Corporation Counsels warned Nuccio not to testify at the coroner's inquest, for fear what he said might jeopardize their defense against Communist-fronter Gertz." (R. 17)

Not only did this article appear in "American Opinion", but it was also distributed in reprint form in the streets of Chicago, as well as elsewhere. (Tr. I 23) In fact, this

is how the article first came to petitioner's attention. (Tr. I 25, 76)

After looking into the matter to determine liability, petitioner brought suit almost immediately against respondent. Despite the commencement of suit and service of summons upon respondent and the information contained in the complaint, completely discrediting the defamatory article, distribution of the article, both in magazine and reprint form, continued unabated in substantial amounts, for months afterwards, almost to the very time of trial. (Tr. I 56)

Respondent moved to dismiss the complaint for failure to state a claim upon which relief can be granted, or alternatively, for failure to satisfy the requisite jurisdictional amount. (R. 39) This motion was denied by the District Court, which held that it was libelous *per se* to label one falsely a Communist. The court went on to hold that since the article dealt with petitioner's participation as counsel in certain private law suits, it therefore reflected primarily and directly upon his profession and practice of law. The Court held that the charges contained in the article imputed to petitioner a want of the requisite qualifications to practice law, as such an imputation must necessarily cast grave doubts upon his qualifications to uphold, apply and interpret our system of laws, which is opposed by Communist theory, and was therefore actionable *per se*. 306 F.Supp. 310.

In conducting the *voir dire* the trial court inquired of all prospective jurors whether they had heard anything about petitioner. (Tr. I 5) Not one indicated that he was familiar with him in any way, which the District Court found significant in concluding that he was not a public figure. (Tr. II 50)

At the trial, respondent made no effort to prove that any of the statements in the article concerning petitioner were true. It admitted that "prior to the publication of the controverted article, and at the time of the promulgation thereof, this defendant had no knowledge concerning the plaintiff other than the article itself. In publishing the article it relied solely upon the reputation of the free-lance writer, Mr. Stang for accuracy." Despite this, the managing editor of the magazine admitted at the trial that he personally had written in the magazine that the author of the article had conducted extensive research into the Nuccio case and had gotten the facts. He further wrote that the trial of Officer Nuccio was part of the Communist war on police, and that the article was so important that reprints would be made immediately available. He also wrote a caption under petitioner's picture in the article stating: "Elmer Gertz of Red Guild harasses Nuccio." (Tr. I 26-7, 34-5)

The managing editor admitted that his sole source of information for each of these statements was the article itself. He made no attempt to verify any of this information appearing in the article. No other attempt was made by anyone on behalf of respondent to verify this information. (Tr. I 34-7)

In fact, the idea for the article was generated by the managing editor, who approached the author, informed him of the Nuccio case and requested him to look into the situation, with a view to meeting the specific needs of American Opinion magazine. (Tr. I 38) Respondent considered this a very important article and rushed it into print more quickly than usual. In effect, the article was designed and tailored by respondent, vouched for by it, and edited so as to express its viewpoint.

American Opinion magazine espouses the doctrines and viewpoints of the John Birch Society. (Tr. I 45) The magazine is distributed through American Opinion Book Stores, children of the same corporate father, the John Birch Society. There are approximately 280 of these stores across the country. (Tr. I 51) About 42,000 copies of the magazine were circulated through the subscription list, and 86,000 reprints of the article were distributed across the country by respondent. (Tr. I 53, 55) These magazines and reprints were still being sent out in large numbers months after the filing of the instant cause and service of process. (Tr. I 56)

Petitioner testified that at no time had he been contacted by anyone regarding the research for this article or any of its allegations. (Tr. I 77) He denied all of the specific defamatory statements concerning him contained therein, including the following:

1. He had never been a member of the League For Industrial Democracy, the Intercollegiate Socialist Society, nor any organization, whether named in the article or otherwise, which purportedly advocated the violent seizure or overthrow of the government. (Tr. I 81)

2. He was never involved in a Peace Parade in 1968 in Chicago, nor at any time. (Tr. I 82)

3. He had no connection whatsoever with the Walker Commission or its Report. (Tr. I 82)

4. He had never heard of "The Red Guild." (Tr. I 83)

5. He has never been a member of the Chicago Peace Council. (Tr. I 83)

6. At no time has he ever espoused a Leninist or Communist doctrine, nor any similar doctrine, nor has

he at any time ever been a Leninist or Communist or Marxist nor anything similar. (Tr. I 84)

7. He had been legal counsel for the Sparling Commision, a group of leading citizens, which issued a report entitled "Dissent and Disorder", but none of the members of the Commission was in any way connected with any Communist organization. (Tr. I 84-5)

8. At no time did he have any connection with any criminal case against Nuccio. He appeared and asked questions at the inquest on the deceased, Ronald Nelson, in behalf of the family. That inquest reached no conclusion as to the cause of death of Ronald. There were also other attorneys present at that inquest, including an attorney for Nuccio. (Tr. I 86-7)

9. He never attended any of the sessions of any criminal case against Nuccio, nor did he make any public statements regarding either the criminal or civil cases. (Tr. I 88)

Gertz testified that he does not believe in violence of any kind. (Tr. I 154) No evidence to the contrary was offered. He testified as a lawyer with 40 years' experience that no attorney who is a Communist, Leninist or Marxist can properly represent clients who have property, financial or business interests, because Communism negates private property. Gertz testified that he believes in the institution of private property and has represented clients with property, financial and business interests. Most of his practice has related thereto. (Tr. I 159)

At the time the article was published, the Chicago Police Department had no intelligence file on him. (Tr. I 123, 211) It was utterly untrue, as claimed in the article, that there was a file on Gertz so big that it "takes a big, Irish cop to lift."

Respondent offered no witnesses to establish any alleged Communist conspiracy against the police and no evidence whatsoever of any kind, character or description to link Gertz with any such alleged conspiracy. It admitted that Gertz is not directly a part of any such conspiracy. In closing argument, its counsel admitted that the charges made by it against Gertz are untrue. (Tr. I 219)

Petitioner requested that respondent be required to produce Alan Stang, the author of the defamatory article, as an adverse witness. On respondent's several times repeated representation that Stang was simply a free-lance writer over whom it had no control, the court refused to require it to produce him and denied the requested instruction on the matter as to the inferences to be drawn. After the proceedings were over, petitioner learned for the first time that respondent had deliberately misrepresented the situation to the court; that in fact Stang was a contributing editor of American Opinion and contributing editor, as well, of another John Birch Society Magazine and one of the chief participants in its speakers bureau—an important part of the John Birch apparatus.

The cause was submitted to the jury under instructions which held that petitioner was not a public figure and which informed the jury that the article involved herein were libelous *per se*. The jury returned a verdict in favor of petitioner in the sum of $50,000.00.

After the rendering of this verdict, respondent filed a post-trial motion, upon consideration of which the District Court granted judgment notwithstanding the verdict in favor of respondent, holding that the article "painted the picture of a conspiratorial war being waged by the Communists against the police in general." The court found the subject matter to be one of public interest protected

by the First and Fourteenth Amendments, and in addition held that "by representing the victim's family in litigation brought against the policeman, Gertz thrust himself into the vortex of this important public controversy." The court then concluded that in order to recover petititoner was required to show actual malice, that is, that defendant knew the statements were false at the time it printed them, or that it had made them with reckless disregard as to their truth or falsity. The court concluded that petitioner had failed to prove such malice and therefore entered judgment in favor of defendant, despite the fact that he had concluded at trial that petitioner was not required to produce such proof and that, therefore, petitioner had not offered all of such available evidence of malice. (In fact, a good deal of evidence of malice appears in the record, but by no means all that might have been adduced, had opportunity to present it been afforded.)

Petitioner appealed to the United States Court of Appeals for the Seventh Circuit, which court affirmed the judgment of the trial court. The opinions of the Court of Appeals and the District Court are set forth in the petition for writ of certiorari.

SUMMARY OF ARGUMENT.

While this Court has been able to reach substantial agreement concerning the rules to be applied in libel cases involving public officials, it has been unable to reach such agreement regarding private persons who for one reason or another have become involved in events which are of public interest and importance.

This case presents a situation not previously considered by this Court. Petitioner here is not a public official nor

a public figure. He did nothing to thrust himself voluntarily into the limelight, nor is the subject matter of the article involved herein one involving action on the part of any governmental organization or entity insofar as petitioner is concerned. This factual situation results in a direct confrontation between the constitutional rights of freedom of speech and privacy.

A person's involvement in a matter of public interest and importance is based upon his conduct—conduct about which the public has the right to be informed. This being the basis upon which petitioner will be judged, it is fair and equitable that respondent also be judged by his conduct. Judging respondent by its subjective state of mind robs petitioner of any real opportunity to obtain redress for harm done to him, in violation of his constitutional right of privacy.

Since it is a constitutional right which petitioner seeks to protect—a right arising out of the Fourth and Fifth Amendments to the Constitution—the standard of conduct set forth in those amendments, probable cause, should be imposed on respondent. Petitioner, in order to make out a prima facie case, would have to prove falsity. Then, respondent would have to establish that he acted with probable cause. This standard would afford both parties the freedom and protection mandated by the Constitution.

Attorneys do not act merely on behalf of themselves. When involved in private litigation, they are the representative of their clients. An attack upon an attorney's reputation and integrity is also an attack upon their clients. Damage to an attorney's integrity is an impediment to his ability to represent his clients properly, and a direct injury to those clients as well.

Despite the holding of the trial court that petitioner was neither a public official nor a public figure, there is sufficient evidence in the record to support a finding of actual malice in the constitutional sense. The chief support for this proposition is the fact that even after it had been served with summons and a copy of the complaint in this matter putting it on notice of the falsity of its statements, respondent continued to distribute the defamatory article, both in magazine and reprint form, for almost a year, in large quantities. Yet, at the trial, absolutely no attempt was made to show that the statements of and concerning petitioner were correct, or that it had any evidence whatsoever to support them. Coupled with other similar elements, pointed out hereinafter, it is clear that respondent was guilty of actual malice.

Finally, the inconsistent rulings of the trial court deprived petitioner of a fair trial. Throughout the pre-trial proceedings and the trial itself, petitioner was informed that he would not be required to present evidence to satisfy the constitutional standard of malice. Only after the jury had rendered its verdict in his favor did the trial court change its position, and hold that plaintiff should have introduced evidence of actual malice in the constitutional sense. The failure to grant petitioner a new trial in order to give him an opportunity do so is clearly a deprivation of due process.

Where the court states that, in this case, the law limiting recovery in libel has been narrowed, for the first time, to the greatest permissible extent, it is a violation of due process to tax thousands of dollars in costs against an admittedly defamed attorney, in light of the discretion of the court in assessing costs. (Argued in petition for certiorari and incorporated herein.)

ARGUMENT.

I.

PETITIONER'S RIGHT OF PRIVACY HAS BEEN WRONGFULLY DESTROYED BY RESPONDENT.

In *New York Times* v. *Sullivan*, 376 U.S. 254, 84 S. Ct. 710 (1964), this Court rendered an opinion which represented a distinct break with the traditional rules of law regarding defamation. Although that decision was not entirely without forewarning, it spawned a profusion of opinions, many of them inreconcileable. That multitude of opinions, many of which have come from the several Justices of this Court, demonstrates the strongly competing interests involved in this area of the law.

The *New York Times* case involved a libel suit brought by a public official—a Commissioner of the City Government of Montgomery, Alabama, whose duties encompassed the supervision of the Police Department, Fire Department of Cemetery and Department of Scales. He claimed that he had been libelled by an advertisement which appeared in the New York Times. This Court there held that in order for a public official to recover for libel as a result of a criticism directed toward his official conduct, he would henceforth be required to prove actual malice, i.e., that the allegedly defamatory matter was printed by defendant with knowledge that the statements were false, or with reckless disregard of whether they were false or not. Id. at 279, 283.

Several considerations were set forth in support of this result, among which were the following. The First Amend-

ment was "fashioned to assure unfettered interchange of ideas for the bring about of political and social changes desired by the people." Id. at 269. "Debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." Id. at 270. "The constitutional protection does not turn upon 'the truth, popularity, or social utility of the ideas and beliefs which are offered.'" Id. at 271. It was held that erroneous statements must be "protected if the freedoms of expression are to have the 'breathing space' that they 'need to survive.'" Id. at 271-72.

Balancing the right of the public to be informed regarding the activities of their officials against the interest of those officials in their good reputation, it was observed that criticism loses none of its protection because it effectively diminishes a public official's official reputation. Id. at 273. In rejecting the common law rule that a defendant be required to prove the truth of its assertions, the Court postulated that a fear on the part of the press that it might not be able to prove the truth of the statements in a court of law even though it believed the information to be true, and even if it was in fact true, would have the effect of dampening the vigor and limiting the variety of public debate. Id. at 279. Citing the common law rule of privilege long available to utterances by public officials within the scope of their duties, the Court held that a critic of public conduct is entitled to the same privilege. Id. at 282.

This view was not shared by all of the Justices of this Court, Justices Black, Douglas and Goldberg taking the position that the First Amendment grants "the press

an absolute immunity for criticism of the way public officials do their public duty." Id. at 295, 298.

In *Garrison* v. *Louisiana*, 379 U.S. 64, 85 S. Ct. 209 (1964), decided shortly thereafter, the actual malice requirements were extended to criminal libel cases. In rejecting the absolutist view taken by the minority in *New York Times*, Justice Brennan wrote that "calculated falsehood is no essential part of any exposition of ideas" and should not enjoy constitutional protection. Id. at 75.

Rosenblatt v. *Baer*, 383 U.S. 75, 86 S. Ct. 669 (1966), dealt with the next progression in this chain of events: "how far down into the lower ranks of government employees the 'public official' designation would extend for purposes of [the constitutional] rule . . ." Id. at 85. Finding it unnecessary to draw precise lines at that juncture, it was found that the "strong interest in debate on public issues" and the "strong interest in debate about those persons who are in a position significantly to influence the resolution of those issues", the Court held that the designation of "public official" would apply "at the very least to those among the hierarchy of government employees who have, or appear to the public to have, substantial responsibility for or control over the conduct of governmental affairs." Ibid.

Even at this early stage in the development of this constitutional frontier, the Court recognized that there is "tension" between the interest in free and open debate and the "pervasive and strong interest in preventing and redressing attacks upon reputation." Id. at 86. At that point it was felt that the Constitutional rule was required "where a position in government has such ap-

parent importance that the public has an independent interest in the qualifications and performance of the person who holds it, beyond the general interest in the qualifications and performance of all government employees." In light of the more recent exposition of this rule after the presentation of additional fact situations before the Court, it is safe to say that this standard has been expanded so that a general interest in the qualifications and performance of all government employees is sufficient ground to require the application of the Constitutional standard to all situations where government employees or personnel are concerned.

In *St. Amant* v. *Thompson*, 390 U.S. 727, 88 S. Ct. 1323 (1968), the Court refined the definition of "reckless disregard" by the holding that the plaintiff must present "sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication." Id. at 731. Disavowing any intent to emasculate the distinction between knowing falsity and reckless disregard, it was said:

> "Professions of good faith will be unlikely to prove persuasive, for example, where a story is fabricated by the defendant, is the product of his imagination, or is based wholly on an unverified anonymous telephone call. Nor will they be likely to prevail when the publisher's allegations are so inherently improbable that only a reckless man would have put them in circulation. Likewise, recklessness may be found where there are obvious reasons to doubt the veracity of the informant or the accuracy of his reports." Id. at 732.

In *Monitor Patriot Co.* v. *Roy*, 401 U.S. 265, 91 S. Ct. 621 (1971), the "public official" definition was extended

to include candidates for public office as well as incumbents. Id. at 271. There any dichotomy between statements relating to official as opposed to private conduct was rejected on the ground that "anything which might touch on an official's fitness for office is relevant." Id. at 273. A rule which would allow the jury to determine whether the charge levelled against the candidate was "relevant" to the elective office being sought was rejected on the ground that "as a matter of constitutional law . . . a charge of criminal conduct, no matter how remote in time or place, can never be irrelevant to an official's or a candidate's fitness for office for purposes of application of the 'knowing falsehood or reckless disregard' rule of *New York Times Co.* v. *Sullivan.*" Id. at 277. See also *Ocala Star-Banner Co.* v. *Damron*, 401 U.S. 295, 91 S. Ct. 628 (1971).

In *Pape* v. *Time, Inc.*, 401 U.S. 279, 91 S. Ct. 633 (1971), decided the same day, the Court applied the same rule to an article based upon an official government report.

With the exception of the heretofore noted absolutist position taken by Justices Black, Douglas and Goldberg, the other members of the Court have seemingly had little difficulty in applying the rule announced in *New York Times* to situations involving government officials and governmental sources.

There has been, however, a decided disagreement when the fact situation leaves this well-defined track, and involves individuals not directly connected with the government. This rift was foreshadowed by the concurring opinion filed by Justice Stewart in *Rosenblatt* v. *Baer*, supra, where he said:

"The right of a man to the protection of his own reputation from unjustified invasion and wrongful hurt reflects no more than our basic concept of the essential dignity and worth of every human being—a concept at the root of any decent system of ordered liberty. The protection of private personality, like the protection of life itself, is left primarily to the individual States under the Ninth and Tenth Amendments. But this does not mean that the right is entitled to any less recognition by this Court as a basic of our constitutional system."

• • •

". . . The First and Fourteenth Amendments have not stripped private citizens of all means of redress for injuries inflicted upon them by careless liars. The destruction that defamatory falsehood can bring is, to be sure, often beyond the capacity of the law to redeem. Yet, imperfect though it is, an action for damages is the only hope for vindication or redress the law gives to a man whose reputation has been falsely dishonored.

"Moreover, the preventive effect of liability for defamation serves an important public purpose. For the rights and values of private personality far transcend mere personal interests. Surely if the 1950's taught us anything, they taught us that the poisonous atmosphere of the easy lie can infect and degrade a whole society." 383 U.S. at 92-94.

In *Curtis Publishing Co.* v. *Butts* and *Associated Press* v. *Walker,* 388 U.S. 130, 87 S. Ct. 1975 (1967), the Justices were unable to resolve the conflicting policies between the public's right to know, and the individual's right to protect his reputation in a clear-cut manner. In the opinion announcing the decision of the Court, Justice Harlan counselled against a blind extension of the

New York Times rule, at the same time recognizing that the protection afforded by the First Amendment "must embrace all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period." It was the view expressed in this opinion that while freedom of speech is as much a personal right to make thoughts public as it is a social necessity required for the "maintenance of our political system and an open society," an individual publisher has no special privilege to invade the rights and liberties of others. Id. at 149, 150.

Justice Harlan concluded, in light of his thorough analysis, that "it is the conduct element, therefore, on which we must principally focus if we are successfully to resolve the antithesis between civil libel actions and the freedom of speech and press." Id. at 153. This approach led the Justice "to seek guidance from the rules of liability which prevail in our society with respect to compensation of persons injured by the improper performance of a legitimate activity by another." Such an analysis led to the drawing of a balance between "a departure from the kind of care society may expect from a reasonable man performing such activity" and an investigation of "the plaintiff's position to determine whether he has a legitimate call upon the court for protection in light of his prior activities and means of self-defense." Id. at 154.

Under traditional tort rules both Butts and Walker would have been classified as "public figures", having both commanded a substantial amount of independent public interest, Butts by virtue of his position as a famous football coach, and Walker, by his purposeful activity thrust-

ing his personality into the "vortex" of an important public controversy. Central to this finding was the conclusion that "both commanded sufficient continuing public interest and had sufficient access to the means of counterargument to be able to expose through discussion the falsehood and fallacies" of the allegedly defamatory statements. Ibid. Justice Harlan's analysis led him to a standard allowing a "public figure" to recover for a libelous statement "on a showing of highly unreasonable conduct constituting an extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers." Id. at 155.

Chief Justice Warren, along with Justices Brennan and White, would adhere to the standard of *New York Times,* the latter disagreeing that punitive damages could be based upon personal ill will or hatred on the part of defendant. Id. at 173-74. Justices Black and Douglas adhered to their strict view that the First Amendment prohibits all libel actions against "the press." Id. at 172.

Thus, no clear-cut majority rule emerged for any standard. This disagreement became even more pronounced in *Rosenbloom* v. *Metromedia, Inc.,* 403 U.S. 29, 91 S. Ct. 1811 (1971). All members of the Court agreed that defendant's radio broadcast of a news story about plaintiff's arrest for the sale of allegedly obscene magazines was a legitimate matter of public interest and importance.

In an opinion written by Justice Brennan, joined by the Chief Justice and Justice Blackmun, it was held that the *New York Times rule* would be extended "to all discussion and communication involving matters of

public or general concern, without regard to whether the persons involved are famous or anonymous." Id. at 44. This conclusion was based upon the rationale that "we are all 'public' men to some degree." Id. at 48. The reasonable man standard was rejected as inconsistent with the interests sought to be protected by the First Amendment. Id. at 50.

Justices Marshall and Stewart suggested a completely different approach to the problem, opting for a rule that would leave the states "essentially free to continue the evolution of the common law of defamation and to articulate whatever fault standard best suits the State's need' with the caveat that strict liability cannot be used. They would, however, restrict damages to actual loss, allowing "more than direct pecuniary loss" but requiring that the damages "be related to some proved harm." Id. at 86.

Justice Harlan, in line with his analysis in *Butts* and *Walker*, would hold the defendant to a standard of reasonable care where the plaintiff is a purely private individual. Id. at 72. He would allow damages which would compensate for "those consequences of the publication which are reasonably foreseeable." Id. at 68. Punitive damages would likewise be limited to those which bear "a reasonable and purposeful relationship to the actual harm done." Id. at 75. Justice White, protesting that the other opinions filed in that case decided questions not before the Court, would focus on the nature of the actions being reported on, and limit the holding to the view that "the First Amendment gives the press and the broadcast media a privilege to report and comment upon the official actions of public servants in full detail,

with no requirement that the reputation or the privacy of an individual involved in or affected by the official action be spared from public view." Id. at 62.

But what of the non-public figure who is not involved in a report of official action? The instant cause presents all of the issues which were specifically left unresolved in the foregoing cases. Plaintiff is an attorney of long standing and good reputation in Chicago. While it cannot be said that he was unknown, he was hardly a personage who commanded a substantial amount of independent public interest at the time of the publication involved herein. In fact, the editor of defendant's magazine had never heard of him. Similarly, none of the members of the jury panel in this cause could ever recall having heard his name. Nor had he voluntarily thrust himself into a public controversy over the persons or incidents involved herein. He represented private clients in private litigation. He made no public speeches, statements or appearances of any kind in regard to the matter discussed in the defamatory article. He did absolutely nothing to call attention to himself or to his clients in regard to this subject-matter. Nor did the article allege that he had. The only statement in the article regarding his actions in this matter were that he had "filed three suits against Officer Nuccio and the City of Chicago" and that he "was active at the inquest" into the death of the slain youth. The rest of the statements concerning him were in reference to alleged former activities and his membership in various organizations which were falsely characterized as being Communistic or Communist-dominated.

It is in such a situation where the right to be let alone collides head-on with the right of the public to be informed. This collision was discussed by the Court in *Time, Inc.* v. *Hill,* 385 U.S. 374, 87 S. Ct. 534 (1967). In that non-defamatory context a majority of the Court held that so long as the press spoke of a person in regard to his involvement in a matter of public interest and importance, that person could not recover an award for the invasion of his privacy unless the *New York Times* standard was met. Id. at 387-88. Again, the question was reserved as to the result in a libelous situation where the plaintiff was involuntarily thrust into the public limelight. Id. at 391.

Again, there were vigorous dissents. Justice Harlan declared that the "First Amendment, and as reflected in the Fourteenth, cannot be thought to insulate all press conduct from review and responsibility for harm inflicted." In his view, the press "can also be reached when it creates a severe risk of irremediable harm to individuals involuntarily exposed to it and powerless to protect themselves against it." Id. at 410.

Justice Fortas, joined by Chief Justice Warran and Justice Clark, pointed to the constitutionally protected right of privacy, which had been described by Justice Brandeis over forty years ago as "the most comprehensive of rights and the right most valued by civilized men." *Olmstead* v. *United States,* 277 U.S. 438, 478, 48 S. Ct. 564, 572, 72 L. Ed. 944 (1928). They would hold that "the standard of a 'reasonable investigation' is certainly a minimum yardstick by which to measure the liability of publishers." Id. at 417.

The facts of this case present a clear-cut example of the kind of mischief which can be wrought by ignoring the right of privacy which this Court has so ringingly affirmed in other contexts. The Court of Appeals below observed that "the addition of an unnecessary and irrelevant comment about a private individual is not automatically protected simply because it is contained in an article dealing generally with an important subject." Then, without fully considering the matter, it held that "even a false statement of fact made in support of a false thesis is protected unless made with knowledge of its falsity or with reckless disregard of its truth or falsity." Where is the consideration for plaintiff's right of privacy? While the article dealt with some official activity—the murder prosecution of a Chicago Police Officer—plaintiff was not a part of that prosecution in any way. Yet, defendant alleged in its article that not only was plaintiff a person who did not believe in our form of government, but was one who had actively taken part in a brazen conspiracy to convict an innocent man of murder. Each and every one of these statements were false. Plaintiff testified to their falsity, and defendant made absolutely no attempt to show that even one of them was true. Yet, because plaintiff, not being given an opportunity to do so, did not prove that the publisher knew they were false, or acted with reckless disregard of their truth or falsity (a high degree of awareness of their probable falsity), he has been denied compensation for such obviously damaging statements. (In fact, there is evidence from which it can be concluded that defendant was so reckless as to be malicious, i.e., its continued distribution of the defamatory article long after the filing of suit.) Such a result cannot be counte-

nanced by a system which seeks to grant justice to all men. Some reasonable accommodation must be made between the right of the private individual to be let alone and the right of the public to be informed on all manner of public affairs.

That the public is entitled to a vigorous, free and untramelled press cannot be disputed. That along with freedom must go responsibility is a necessary corollary. There must be some limitation upon freedom, as upon power. Absolute freedom, like absolute power, results in anarchy and corruption. The right of the individual must be protected if we are not to regress to the level of savages.

In *Rosenbloom* this Court left open for further exposition the delineation of the reach of the term "issue of public or general concern." Supra, at 44. Candor compels the conclusion that given the broad range of matters vital to a society as complicated as ours any subject deemed to be worthy of comment save the most egregiously inappropriate personal attacks upon an obscure individual are proper for discussion by the press. What limit, then, is available to avoid unrestricted license which must ultimately lead to intolerable abuse?

Requiring this plaintiff, as well as others similarly situated, to prove knowing falsity, or a high degree of awareness of falsity, is certainly not the answer. The persons who would have knowledge of such facts are those who would have most cause to deny their existence. Particular difficulty is encountered in a situation such as the instant case where the article was written not by an agent or employee of the publisher, allegedly, but by a free lance writer, an independent contractor. (In

fact, he was an instrumentality of the publisher.) Yet, defendant, accepts the benefit of his views, written to its order, and reaps the reward in the form of sales of its magazine. How can a plaintiff hope to prove that the publisher had actual knowledge of the falsity of its material even where the publisher, as here, commissions the article? How can plaintiff prove that defendant had any degree of awareness of the possible falsity of the article when the publisher states, as was the case here and will be the case in virtually every situation, that it merely took the story as it was given to it and published it verbatim. Such a holding destroys any ability of a private individual to obtain even the slightest recompense for his damage. A public official or public figure has the ability to reply in kind. He has access to a forum in which to defend himself, for what a public official says is generally considered news. But what of the obscure, unknown individual caught up in the maelstrom of some issue in which the public may be interested, not of his own making? Where the matter is not one of "hot news" the likelihood that he will be interviewed, or even listened to, by a reporter is slim, to say the least. His ability to write a letter to the editor's column is illusory, particularly where the editor who decides whether or not to print his rebuttal is most likely to be the one who authorized publication of the defamatory material against him in the first place.

It is obvious that such a person's only recourse is to the courts. By dint of one-sided rules militating against him, close their doors to him, he must bear his loss in solitude. Many states, including Illinois, have State constitutional provisions which guarantee that for every

wrong there shall be a remedy. Illinois Constitution of 1970, Article I § 12. That is not an idle platitude, but a soaring goal earnestly to be sought, and hopefully obtained. Certainly, perfection is the most illusory goal imaginable. Yet, we must strive to approximate that goal as nearly as our frail abilities allow.

We deal here with a collision of great ideals. The worth of the individual, no matter how small or obscure, is the pervasive ideal of our system. Every individual must be afforded at least an opportunity to seek redress for his injuries. An attitude which postulates that the "public good" is more important than the worth of such an individual will surely lead to a repressive society. Here, the repression is not at the hands of the government, but at the hands of those wealthy and fortunate enough to gain access to the channels of communication of this country. Our anti-trust laws seek to inhibit economic repression. Personal repression must not be countenanced in the guise of freedom of the public to be erroneously informed. No segment of society is entitled to a special right. Yet, all would agree that the press must be allowed to flourish. A balance must be struck which is even-handed and fair to both interests which are of the utmost importance to the continuation of our society.

How does an individual become involved in a matter which becomes of interest and importance to the public? In almost every conceivable instance, it is because of some conduct on his part. In the case of public officials, they have sought public office. In many instances, they have taken some action in the execution of the duties of that office of which the public ought to be informed. In the case of public figures, such as General Walker, they

have taken some overt action which catches the eye of the public. In the case of individuals such as Mr. Butts, they are involved in some activity which depends upon public participation or at least public spectatorship for its existence. In a situation such as *Rosenbloom* they have engaged in some activity thought to violate the law. They are involved in matters of public interest and importance as a result of some conduct on their part—some action or activity which has called them to the public's attention.

Plaintiff here attended and participated in an inquest to the extent of asking some questions and brought suit on behalf of clients. He did not seek nor did he engage in any controversy or publicity. In such a situation, where the defamatory comment about the private plaintiff, a lawyer in private practice, is not germaine to what he has done in regard to the subject matter being discussed, should he be judged by his state of mind or by his conduct? As set forth in *Rosenbloom,* the protection accorded the press revolves about the public's right to receive information about plaintiff's conduct—things which he has done. Insofar as the subject matter of this article is concerned, the public may have a legitimate right to know what, if anything, plaintiff did in regard to participating in the prosecution of officer Nuccio. He had absolutely nothing to do with it, as testified to by Nuccio's own attorney. In its article, defendant had asked the public to judge plaintiff based on his alleged activities—both past and present—having nothing to do with the Nuccio case. Defendant asks the public to judge plaintiff on his conduct—his membership in various organizations, his actions in furtherance of his membership in

those organizations; these things having nothing to do with the Nuccio case.

Yet, defendant has argued, and the Court of Appeals below has held, that defendant is not to be judged by the same standards. Defendant is not to be judged on its conduct, but its invisible or professed state of mind. Yet, defendant is able wholly to control what is to be regarded as its state of mind. It can deliberately close its eyes to the facts by not inquiring into them; even when it has commissioned an article, as here. Plaintiff's ability to succeed, under this view, is dependent upon the wholly fortuitous circumstances that perhaps someone, unbidden, will call defendant's attention to the true facts and put it on notice of the falsity of its publication. In other words, defendant is able to manufacture its own immunity, in good faith or in bad faith. It picks the subject, assigns an author to seek the "facts" which it desires, and which will support its preconceived attitudes, and no more. It then piously declares that it has no knowledge that the statements were false, and merely relied upon the independent author. In truth—despite any legal fiction—defendant published the article because it supported a preconceived viewpoint.

Such a situation deprives plaintiff of his own worth. That worth may be destroyed in a single stroke, and yet he has no recourse. Being unable to reply in kind, he must accept his lot and not complain. Such a standard destroys the privacy of the individual, and deprives him of his constitutional right to be let alone. It robs him of his reputation without redress.

Why should not defendant be judged by its conduct in the context of the fact situation? The factors to be considered have been discussed by the Justices of this Court in various contexts. As set forth by Justice Harlan in *Butts,* they include: the harm inflicted upon the plaintiff; the seriousness of the charges; whether the matter printed was "hot news"; the reliability of the source; the presence or absence of substantial independent support for the source's information; the attempts, if any, to verify the story; the bias, if any, of the investigators; the policy and attitude of the publication itself; and the internal consistency of the story itself. These are all factors that both judges and juries are called upon to consider daily. The test of time has proven that these are the kinds of guidelines with which the courts work best. They are the kinds of factors with which we each deal in our daily activities. They are familiar and reliable.

The objection, however, is that unless assured of a reasonable standard by which it is to be judged, the press will be forced into self-censorship, and the public will be deprived of the information which it requires in order for our society to function. Various tests have been proposed in the various opinions of this Court in recent libel cases. None have achieved sufficient acceptance.

As Justice Harlan also observed in *Butts,* one of the relevant factors to be investigated is "the plaintiff's position to determine whether he has a legitimate call upon the court for protection in light of his prior activities and means of self-defense." *Curtis Publishing Co.* v. *Butts, supra,* at 154. It is postulated in cases such as this that plaintiff has engaged in no prior activities which would

subject him to public scrutiny and that he has no adequate means of self-defense. The only remaining test to determine whether he has a legitimate call upon the court for protection is whether he has been defamed. Certainly he has no claim upon the protection of the Court unless the defamatory material is untrue. If true, plaintiff has suffered no more than he deserves. It therefore seems legitimate that the plaintiff be required to prove, in the first instance, that the defamatory material is false. This would ensure that the press need not fear printing the truth, and exercise self-censorship upon pain of having to prove the truth in Court. Since plaintiff is complaining of injury to his reputation, it is certainly not too much to ask that he be required to prove that the defamation is unjust.

But by what standard is defendant's conduct to be measured? It is respectfully submitted that the answer to the collision of the two great constitutional interests is found in the constitution itself. The right of privacy has been said to emanate from the penumbra of the Fourth and Fifth Amendments to the Constitution. *Griswold* v. *Connecticut,* 381 U.S. 479, 484-85, 85 S. Ct. 1678 (1965). That being the case, the source of that right ought similarly to define its protection. A deprivation of a person's privacy, by way of destroying his reputation, is certainly a taking as surely as any search or seizure. The Fourth Amendment prohibits any search except "upon probable cause." Why should this standard not be applied to a taking such as this as it is applied to the taking of a person's physical liberty? The courts are eminently used to making determinations of probable cause. The factors to be taken into consideration in such a determination

are strikingly similar to the factors discussed by Justice Harlan in *Butts*. See also *St. Amant* v. *Thompson* where the court considers the reliability of the informant. As made clear in *Monroe* v. *Pape*, 365 U.S. 167, 81 S. Ct. 473 (1961), and its progeny, a taking without probable cause is compensable in damages. Under proper instructions, the jury is considered perfectly capable of making such a determination. As explained in *Pierson* v. *Ray*, 386 U.S. 547, 87 S. Ct. 1213 (1967), good faith and probable cause are appropriate defenses in a case where the plaintiff seeks damages for deprivation of his Fourth Amendment rights by governmental officials. The State is held to this standard before it may invade a person's privacy by way of a physical search and seizure. Is it not appropriate to require that the press be held to this same standard when it has been alleged that it has similarly invaded a man's privacy by wrongfully defaming him.

This suggestion does not smack of censorship in any manner. There is absolutely no suggestion of censorship here. The press is perfectly free to publish what it will. The plaintiff has the burden of proving falsity, thus relieving the press of the requirement of guaranteeing the truthfulness of its statements. It need only show that it had some probable cause to believe the truth of the statements. Such a standard will give the press the breathing room it requires but will ensure that persons like plaintiff will have a legitimate opportunity to obtain recompense for harm done to them where the press has abused its liberties. The burden thus placed upon the press is minimal. Can it be said that the values guarded by the press are any more important than the values guarded by our police? When the police trample upon civil rights and

liberties, they are subject to sanctions. Similarly, the press, in this area, should be called upon to account for harm done by infringing the constitutionally protected right of privacy, in a manner which offends the very standards of the constitution itself. Those who thrust themselves purposefully into the limelight have waived their right of privacy. While we are all public men to a limited extent, we do not throw ourselves open to unprovoked and unjustified attacks which have no basis in fact, when we have done nothing to call the public's attention to us. When a person has not engaged in activity which would call the public attention to him, he is entitled to maintain that anonymity which has been destroyed by the purposeful action of the defendant. It is perfectly justifiable to call upon defendant to show that he had probable cause to make the false statements about plaintiff and bring him unbidden to the public eye.

That defendant here had no such probable cause is abundantly clear. No attempt at all was made at the trial to defend the false statements regarding plaintiff. The only defense was that the editor of defendant's publication relied upon the author. Yet, there is evidence that the author did not even discuss the subject matter of the article with officer Nuccio's attorney, nor with plaintiff. No hint is given of where he obtained his information about plaintiff. Yet, without any basis whatsoever, defendant's editor specifically stated that the author had "conducted extensive research into the Richard Nuccio case," had "gotten the facts" and "that this is a part of the Communist war on our police is as certain as the innocence of the officer they have chosen as their symbolic target." (Parenthetically, it should be pointed out that

after Nuccio had been convicted in a bench trial, his conviction was reversed and remanded by the Illinois Supreme Court. *People* v. *Nuccio*, 43 Ill. 2d 374 (1969). Upon retrial, he was again convicted, this time by a jury, which conviction has been upheld by the Illinois Supreme Court just recently. ..... Ill. 2d ....., Docket No. 43820, March 27, 1973). The editor, Stanley, admitted that he had absolutely no basis for making these assertions, other than from the text of the article itself, and "an implied relationship between an author and an editor." Bear in mind that Stanley completely misrepresented the author's connection with the magazine and the John Birch Society. He has a direct, official connection with both.

The record is clear that defendant had a pre-conceived plan to attack plaintiff, as well as the others mentioned in the article, and that that plan was to label all such persons Communists, regardless of the facts. Defendant cannot be allowed to sidestep responsibility for these calculated statements by saying that it relied upon Stang. The evidence shows that it sent Stang out to write this very article, telling him beforehand what he was to say. Such an abuse of the freedom of the press cannot be countenanced, but must be condemned as a clear violation of plaintiff's constitutional right of privacy.

II.

ATTORNEYS ARE ENTITLED TO A PARTICULAR PROTECTION WHEN REPRESENTING CLIENTS.

Were the statements made of petitioner's activities on his own behalf, the destruction of his reputation would be serious enough. Here, however, petitioner's involve-

ment came about not because of what he had done on his own motion, but because of actions which he took in good faith on behalf of clients who had retained him to represent them. He was not acting out of any personal motivation, but in carrying out his duty as a representative of others who had come to him in this particular function and capacity. Thus, respondent's actions had a three-fold effect: 1) they tended to destroy petitioner's own personal reputation, both as a person and as an attorney; 2) they tended to destroy his ability properly to represent these particular clients; and 3) they tended to destroy his ability properly to represent other clients who had absolutely no involvement with this subject matter.

Attorneys are held to a high degree of responsibility in representing their clients. They are personal representatives, acting in a fiduciary capacity. Not only are they entitled to the same protection of their private reputations as are others, but also their clients are entitled to have their attorney's reputation protected. Statements such as were made about petitioner by respondent here could well make other clients of petitioner fear that as a result of these statements, petitioner would be unable properly to represent their interests. Indeed, should respondent's attacks become widely known and believed, they could in fact hamper petitioner's ability properly to represent those other clients, particularly those having property interests. Petitioner's arguments and positions on behalf of clients would not be judged upon their merits, but always against the background that perhaps he was not merely acting on behalf of his clients, but also with a view toward furthering his own personal "Communistic" views and attitudes.

In seeking to become an attorney, an individual voluntarily takes upon himself the duties imposed by the canons of ethics. This is a burden willingly assumed for a variety of individual reasons. By assuming this burden, to act fairly and honestly in behalf of others, to represent them in the furtherance of our public policies in favor of amicable, non-violent resolution of disputes, does he thereby place himself, as well as his clients, in such a position as to become fair game for every crackpot or extremist with an ax to grind?

Is every attorney, representing a client, to be exposed to the most scurrilous attacks, with absolutely no recourse? May a defamer concoct wholly fictitious stories about an attorney which have no legitimate connection with the matter at hand? Are the members of the legal profession such public figures that they imperil their own livelihood, as well as the livelihood of their clients, to all unfounded attacks with absolutely no recourse? These issues must be considered carefully and fully, not in an offhand manner.

The resolution of those issues must be in favor of the attorney who fairly seeks to represent others, lest we make it so unpalatable for individuals to seek this position of trust that the public will be unable to obtain qualified representation.

III.

RESPONDENT WAS GUILTY OF ACTUAL MALICE.

Regardless of the rule of law to be applied in this case, the evidence is clear that respondent was guilty of actual malice both in punishing the article originally and in its

continued dissemination of the article after the institution of this suit.

The strictest test of malice, of course, is that set forth in *New York Times* v. *Sullivan, supra,* as expanded in *St. Amant* v. *Thompson,* 390 U.S. 727, 885 Ct. 1323 (1968), where it was defined as actual knowledge of the falsity of the statements made, or reckless disregard of whether the statements are true or false, i.e., with a high degree of awareness of the probable falsity of the statements. Here, the entire defense presented by respondent was that it relied upon Alan Stang, whom it described as a free lance writer, who had proven to be an accurate and complete researcher. No attempt was made to prove the truth of any of the assertions in the article regarding plaintiff. No witnesses were offered to establish the alleged Communist conspiracy against the police and no evidence of any kind, character or description was introduced to link petitioner with either such conspiracy, or with any Communist organization.

As proven by petitioner at trial, without any attempt at contradiction by respondent, we have here a situation in which there are not simply exaggerations, discrepancies, or slight errors, but monumental misstatements; lies made out of whole cloth. There was not even the slightest basis for calling petitioner a Communist, Communist-fronter, Leninist, Marxist or anything of that nature. These statements were not mere hyperbole or coloration, but completely false fabrications of the most damaging kind to an attorney dealing with propertied clients. Even if public issues were involved, respondent had no right to publish defamatory falsehoods about plaintiff who was an innocent bystander, representing purely private interests.

The conclusions reached by this Court regarding *Butts* are clearly applicable to this cause. Each of the following elements found in that case are present in this case: the story was in no sense "hot news"; elementary precautions were ignored; there was no support, independent or otherwise, for the statements made in the article; the author's notes were not viewed by any of the defendant's personnel without substantial independent support; no attempt was made to check with any of the others involved in the situation to check the accuracy of the statements made. As was stated in *Butts,* "the evidence is ample to support a finding of highly unreasonable conduct constituting an extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers."

There is no question that respondent is not what can be termed a "responsible publisher." It has a specific aim and viewpoint—to further the views of the John Birch Society, its parent organization. (Tr. I 186) In fact, this article was not merely submitted by Stang, but he was solicited by Stanley, the managing editor of defendant, to work on this story. By Stanley's own admission, Stang had written for defendant before, and there is no question that Stang knew what Stanley was looking for. Stang wrote an article which appeared in the October 2, 1968, issue of "Review of the News", another John Birch Society publication, of which Stang is contributing editor. In this article, Stang called both Richard M. Nixon and Hubert H. Humphrey Marxists and lumped them with Eisenhower, Paul Hoffman, Nelson Rockefeller and other great Americans as conniving with the Communists. This is the kind of work upon which Stanley

based his conclusion that Stang's facts are always accurate!

Respondent cannot be viewed in a vacuum. Its shrill and pronounced views which have been disseminated throughout the years makes it clear that it has an ax to grind, and that it will do so at every opportunity, regardless of the facts. Respondent is, indeed, well aware of its own propensities for maliciously defaming its betters. So characteristic is it of respondent and its affiliates that, undoubtedly fearful of the conclusions that might be drawn, its counsel presented a pre-trial motion in limine which speaks volumes as to its practices and the meaning thereof:

> "Now comes the defendant and moves the Court to limit the evidence and the questions and comments of counsel in the following respects:
>
> "1. In matters relating to other actions in defamation wherein the party defendant may have been a litigant, and not related to this case;
>
> "2. To matters relating to ostensibly slanderous or related comments by officers of the defendant corporation or individual members of the John Birch Society and concerning parties other than the plaintiff in this case, and particularly to the comments of Robert Welch relating to his criticism of President Eisenhower.
>
> "The above subject matter would be irrelevant to any of the issues in this cause and highly prejudicial to the defendant."

If respondent and its affiliates habitually malign great and patriotic Americans such as Generals Eisenhower and Marshall, is this not evidence of a malicious and depraved state of mind? Consider, as set forth above, the

writings of Stang, the author of the article involved herein. Such assertions can be characterized in various ways, not the least obvious of which is its malice. Petitioner is not an Eisenhower or Marshall, but respondent has treated him with the same calculated malice with which these great Americans have been treated. The trial court's conclusion that there was no proof of malice was a result of its having closed its eyes to the most obvious demonstration of it. Is there no public policy against permitting such character assassination in the guise of protected utterance?

Respondent cannot disavow Stang's defamation of petitioner because it vouched for the truth thereof in the very issue in which the article appeared. In the words of its managing editor, Stanley, Stang had "conducted extensive research into the Richard Nuccio case," had "gotten the facts", and "that this is a part of the Communist war on our police is as certain as the innocence of the officer they have chosen as their symbolic target." At trial, Stanley admitted that he had absolutely no basis for making these assertions, other than from the text of the article itself, and "an implied relationship between an author and an editor." (Tr. I 34)

The trial court's rulings prior to and during the trial made it unnecessary for petitioner to offer evidence as to respondent's actual malice or gross recklessness and, indeed, precluded him from so doing. Nevertheless, there is, in fact, and providentially, so much undisputed evidence in the record as to require a finding, as a matter of law, that there was actual malice or gross recklessness on respondent's part.

The chief evidence of gross recklessness is the fact that even after the complaint had been filed in the within matter, respondent continued distributing its defamatory article, both in magazine and reprint form, for almost a year, in large quantities. At that point in time it had received actual notice that the material was false. Yet, it continued to disseminate its scurrilous material to the public at large. This action fits well within the rules previously set out by this Court in *St. Amant* v. *Thompson*, *supra*, "a high degree of awareness of the probable falsity of its statements." Regardless of whether there was such high degree of awareness at the time of the original publication, from the service of summons upon it onward, there was in fact such knowledge. Yet, respondent continued its campaign unabated. This is actual malice as defined by this Court. As indicated above, respondent made absolutely no attempt whatsoever to demonstrate at trial that its statements concerning petitioner were true, or that it had any indication of any kind that they were true. In fact, its counsel admitted that they were untrue. What more evidence of bad faith could be imagined.

In addition, there was other proof which, coupled with this evidence of continued prolonged and widespread publication, was sufficient to support a finding of actual malice, including the following:

a) Respondent made no effort whatsoever to check the accuracy of any of the statements prior to publication, despite its knowledge that petitioner is a lawyer, necessarily dependent upon maintaining his professional and community reputation.

b) Respondent must have known that it is extremely serious to call a lawyer a Communist, or Communist-Fronter, or Marxist, or Leninist or anything similar and this should have put it on notice to check carefully.

c) Since American Opinion is a monthly publication without the deadlines common to the daily press, it had ample opportunity to check the statements in the article.

d) Respondent was in an excessive hurry to publish and distribute the article and reprint.

e) Respondent's managing editor himself vouched for the accuracy of the article although admittedly he had no actual knowledge upon which to base such representation.

f) Respondent's managing editor himself placed defamatory captions with respect to plaintiff in the article.

g) Reprints of the article were literally forced upon people on the Northside of Chicago, where petitioner resides.

h) Respondent persisted in repeating the false charge that plaintiff is a Communist-fronter in its answers to plaintiff's interrogatories, despite the true information imparted to it in the complaint.

i) Respondent's editor persisted in repeating the same defamatory statements about petitioner from the witness stand during the trial.

j) Respondent misrepresented to the court and plaintiff the status of the author of the article, thus leading the court to make an incorrect ruling and precluding plaintiff from cross examining Stang as adverse witness.

k) Stang did not contact Kachigian, Nuccio's attorney, nor did he contact Gertz. There is no evidence that he contacted others with knowledge of the facts. Respondent did not establish Stang's good-faith research. It carefully refrained from calling him to the stand for fear that his and its malice would be patent.

Thus, the testimony at the trial, coupled with the clear pattern of prior statements by respondent, show that the article herein was one of a long line, which were not made with any thought of truth or accuracy in mind, but solely to advance the theories of defendant's parent organization, The John Birch Society, from which respondent receives $1,000,000.00 for disseminating its views. (Plaintiff's Exhibit 4).

The appropriate rules to be applied here are set forth in *Goldwater* v. *Ginzburg*, 414 F. 2d 324 (2d cir. 1969), cert. den. 396 U.S. 1049, reh. den. 397 U.S. 978, where it is said at 337:

> "Reliance upon newspaper articles, books, and campaign literature, and upon accurate reprinting of another's letter are only factors which, with other factors, are probative of whether the publisher of the cumulated material was motivated by actual malice when he caused the full material to be published. Repetition of another's words does not release one of responsibility if the repeater knows that the words are false or inherently improbable, or there are obvious reasons to doubt the veracity of the person quoted or the accuracy of his reports. *St. Amant* v. *Thompson, supra* at 732, 88 S. Ct. 1323. Furthermore, in our case, Ginzburg added certain innuendoes to some quoted statements and quoted other statements out of context in order to support his predetermined

result. One cannot fairly argue his good faith or avoid liability by claiming that he is relying on the reports of another if the latter's statements or observations are altered or taken out of context."

Here, there was much reason to doubt the veracity of Stang, despite the disclaimers of Stanley. Anyone who writes that Richard Nixon, Hubert Humphrey and Dwight Eisenhower are Communists, or are working for the Communists has little claim to credibility. Respondents are not allowed to state categorically that they relied upon Stang, for it was Stanley who set Stang upon the trail, asking for a story saying exactly what was ultimately printed. He in behalf of defendant vouched for Stang's accuracy, and caused reprints of this important article to be circulated throughout the United States, both at bookstores owned by the John Birch Society, and on street corners as well. And, after being placed on notice of the utter falsity of the charges, these distributions continued, and Stanley attempted to repeat the libelous statements in his answers to interrogatories filed on behalf of defendant, and at trial, with absolutely nothing to support them. As was said in *Goldwater,* 414 F. 2d at 339-40:

"There are many parallels between the evidence tending to prove actual malice in this case and the proof in *Curtis Publishing Co.* v. *Butts,* 388 U.S. 130, 87 S. Ct. 1975, 18 L. Ed. 2d 1094 (1967), which the Supreme Court held was sufficient to establish actual malice. The Goldwater did not contain 'hot news'; the appellants were very much aware of the possible resulting harm; the seriousness of the charges called for a thorough investigation but the evidence reveals only the careless utilization of slipshod and sketchy investigative techniques; . . . and, obviously there was evidence as to whether there was a possible pre-

conceived plan to attack Senator Goldwater regardless of the facts. This evidence, together with the other facts brought out at trial established that the appellants not only knowingly published defamatory statements but also established with convincing clarity that the appellants were motivated by actual malice when they published these defamatory statements."

So also here, there is no question but that respondent had a pre-conceived plan to attack petitioner, as well as the others mentioned in the article, and that the plan was to label all such persons Communists, regardless of the facts. Respondent cannot sidestep responsibility for these calculated statements by saying that it relied upon Stang. It did not rely upon him, but sent him out to write this very article, telling him beforehand what he was to say. This is actual malice at its worst.

IV.

PETITIONER WAS DENIED A FAIR TRIAL AND DUE PROCESS.

Throughout the entire proceedings in this cause, petitioner proceeded on the assumption and theory that he was not a public figure, and that the subject matter of the article did not concern a matter of public interest and importance. The rulings of the trial court sustained this postion throughout. In denying respondent's motion to strike, the District Court held that the article was libelous *per se*. The court thus struck those defenses contained in respondent's amended answer which attempted to raise the issue of public figure. The District Court then concluded that the publicity surrounding the Nuccio case was not relevant to the cause, and refused to allow respondent

to introduce such evidence. Finally, the court held during the conference on jury instructions, that respondent was not entitled to raise the defense of the First Amendment privilege in this cause.

At the conclusion of the trial, the District Court held, for the first time, that petitioner was required to prove actual malice in the constitutional sense, that he had not, and that therefore judgment must be rendered for respondent. Indeed, the trial court specifically precluded petitioner from introducing much evidence at the trial (other than the continued widespread and substantial publication and distribution of the article and reprint) which would have indicated actual malice on the part of respondent. Then he was informed that his failure to produce this evidence was fatal to his case! Assuming that petitioner is required to prove actual malice in the constitutional sense on the part of respondent, common fairness requires that he be awarded a new trial before a jury so that he has a full and fair opportunity to do so. At this point he has been deprived of such opportunity. The failure to afford petitioner this right has deprived him of due process of law as guaranteed by the Fifth and Fourteenth Amendments. Nothing could be clearer.

That petitioner could establish malice on respondent's part is evidenced by its continued and widespread publication and distribution of the admittedly defamatory article almost to the moment of trial and by the other facts and circumstances heretofore set forth and discussed in the previous point at Pages 44 to 47.

What is most surprising in the failure to grant petitioner a new trial is that he had introduced much evidence

of actual malice, in the constitutional sense, on the part of respondent, despite his not being required to produce such evidence. The presence of this evidence, which could be greatly elaborated upon and augmented at another trial, makes it clear that the failure to grant petitioner an opportunity for such a trial deprived him of due process of law.

As was proved by petitioner at trial, without any attempted contradiction by respondent, the article did not contain simple exaggerations, discrepancies, or slight errors, but monumental misstatements, monstrous lies made out of whole cloth. There was not even the slightest basis for calling petitioner a Communist, Communist-fronter, Leninist, Marxist, Red, or anything of that nature. These statements were not mere hyperbole or coloration, but completely false, fabrications of the most damaging kind to an attorney dealing with private clients. Even if public issues were involved, respondent had no right to drag in and publish defamatory falsehoods about petitioner who was an innocent bystander, representing purely private interests. The conclusions reached by this Court regarding the plaintiff in *Curtis Publishing Co.* v. *Butts*, 388 U.S. 130, 86 Supreme Ct. 1975 (1967), are clearly applicable to this case. Each of the following elements found in that case are present here: the story was in no sense "hot news"; elementary precautions were ignored; there was no support, independent or otherwise, for the statements made in the article; the author's notes were not viewed by any of respondent's personnel, but were published without substantial independent support; no attempt was made to check with any of the others involved in this situation as to the accuracy of the state-

ments made. As was stated in *Butts*, "the evidence is ample to support a finding of highly unreasonable conduct constituting an extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers."

Respondent cannot disavow Stang's defamation of petitioner, because it vouched for the truth thereof in the very issue in which the article appeared. In the words of its managing editor, Stanley, Stang had "conducted extensive research into the Richard Nuccio case," had "gotten the facts," and "that this is a part of the communist war on our police is as certain as the innocence of the officer they have chosen as their symbolic target." Stanley admitted at the trial that he had absolutely no basis for making these assertions, other than from the text of the article itself and the "implied relationship between an author and an editor." Indeed, there is much undisputed evidence in the record, heretofore summarized, to show either actual malice or gross recklessness.

Thus, the testimony at the trial, coupled with the clear pattern of prior statements by respondent show that the article herein was one of a long line, which were not made with any thought of truth or accuracy in mind, but solely to advance the theories of respondent's parent organization, the John Birch Society, from which respondent receives $1,000,000.00 annually for disseminating its views. (Plaintiffs' Exhibit 4).

The appropriate rules to be applied here are set forth in *Goldwater* v. *Ginzburg*, 414 F. 2d 324 (2d Cir. 1969), cert. den. 396 U.S. 1049, reh. den. 397 U.S. 978, previously quoted.

Here, there was much reason to doubt the veracity of Stang, despite the disclaimers of Stanley. It was Stanley who set Stang upon the trail, asking for a story saying exactly what was ultimately printed. He, in behalf of respondent, vouched for Stang's accuracy, and caused reprints of this important article to be circulated throughout the United States, both at bookstores owned by the John Birch Society, and on street corners as well. And, after being placed on notice of the utter falsity of the charges, these distributions continued, and Stanley attempted to repeat the libelous statements in his answers to interrogatories and at trial, with absolutely nothing to support them. The parallel is found in *Goldwater,* 414 F. 2d at 339-40, previously quoted, as well as in *Curtis Publishing Co.* v. *Butts,* 388 U.S. 130, 87 S. Ct. 1975, 18 L. Ed. 2d 1094 (1967), which the Supreme Court held was sufficient to establish actual malice.

So also here, there is no question but that respondent had a pre-conceived plan to attack petitioner, as well as the others mentioned in the article, and that the plan was to label all such persons Communists, regardless of the facts. It cannot sidestep responsibility for these calculated statements by saying that it relied upon Stang. It did not rely upon him, but sent him out to write this very article, telling him beforehand what he was to say. This is actual malice at its worst, and refusal to at least grant petitioner a new trial was a grave miscarriage of justice.

CONCLUSION.

The Constitution guarantees both the right of freedom of speech and the right of privacy. An accommodation of those rights is imperative in the area of defamation, particularly when the attorney-client relationship is involved. The constitution provides a workable standard to be applied where a private individual is gratuitously implicated in a matter of public interest and importance. The courts have dealt with probable cause over a sufficient period of time within which to make it clear that such a standard is clearly understandable to all persons, and workable. Such a minimal standard will allow the press the breathing space it needs while granting to private individuals, particularly attorneys, a reasonable opportunity to obtain redress for obviously compensable wrongs.

The record in this case shows a flagrant and malicious defamation of a private attorney who in no sense placed himself upon the firing line in the situation involved herein. The subject matter of the article at issue was wholly concocted by respondent, who sent a so-called "free-lance" reporter, really its agent, not to get the facts, but to get misstatements, twisted and distorted in a manner so as to fit respondent's pre-conceived attitude. Certainly the record herein discloses sufficient grounds upon which to reinstate the verdict of the jury.

At least, petitioner is entitled to a new trial. He tried his case under one set of facts and theory, and after that trial had resulted in a successful conclusion, the District

Court and the Court of Appeals changed the rules, and deprived him not only of a judgment which he had gained, but deprived him of an opportunity to meet the standards which were applied to this case *ex post facto*.

The judgment of the Court of Appeals, affirming the judgment of the District Court, must be reversed and the verdict in petitioner's favor reinstated. Alternatively, the judgments below must be reversed with directions to order a new trial.

Respectfully submitted,

WAYNE B. GIAMPIETRO
Attorney for Petitioner.

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In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

No. 72-617

ELMER GERTZ,
Petitioner,

VERSUS

ROBERT WELCH, INC.,
Respondent.

BRIEF OF RESPONDENT ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

C. J. WATTS
219 Couch Drive
Oklahoma City, Oklahoma 73102
Counsel for Respondent

May, 1973

UTTERBACK TYPESETTING CO., 519 W. CALIF., OKLAHOMA CITY, PH. 235-0030

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U. S. v. Robel (1967), 389 U.S. 258, 88 S.Ct. 419 ... 18

U. S. v. Yates (1957), 354 U.S. 298; Scales v. U. S. (1961), 367 U.S. 203 ... 18

Walker v. Courier-Journal & Louisville Times Co., 246 F.Supp. 234 (W.D. Ky. 1965) ... 8

Washington Post Co. v. Keogh (1966); cert. denied (1967), 365 F.2d 905 (C.A.D.C.), 385 U.S. 1101, 17 L.Ed.2d 548, 30 A.L.R.3d 972 ... 16

Wasserman v. Time, Inc. (1970), 424 F.2d 920 (D.C. Cir.) ... 12

Yates v. U. S. (1967), 354 U.S. 298, 77 S.Ct. 1064 ... 18

MISCELLANEOUS:

Emerson, T., "The System of Freedom of Expression" ... 11

"Public Official & Actual Malice Sandards: The Evolution of the New York Times v. Sullivan," at 398 ... 11

"Public Official and Actual Malice Standards: The Evolution of New York Times v. Sullivan," Iowa L.Rev., Vol. 56, p. 396, commenting on Butts decision; See also "The Scope of the First Amendment Protection for Good Faith Defamatory Er-

AUTHORITIES CONTINUED PAGE

rors," 75 Yale L.J. 642 (1966); Berney, Libel and the First Amendment—A New Constitutional Privilege, 51 Va. L.Rev. 1, 45-47 (1965) 7, 11, 16

1 Hansen, "Libel & Related Torts" (1969), at 108 8

In the
Supreme Court of the United States
OCTOBER TERM, 1972

No. 72-617

ELMER GERTZ,
Petitioner,

VERSUS

ROBERT WELCH, INC.,
Respondent.

BRIEF OF RESPONDENT ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

STATEMENT OF THE CASE

The Appellee, Robert Welch, Inc. (hereafter Respondent), the defendant below, publishes a monthly magazine, *American Opinion*, distributed throughout the United States. The Appellant, Elmer Gertz (hereafter Petitioner), the plaintiff below, "is a prominent attorney in Chicago, having represented clients who sometimes command a wide following in the press and media [including Jack Ruby (1)]. He has written books, articles and reviews which have enjoyed wide circulation. He has appeared frequently on radio and television, and has delivered numerous speeches. He has long been involved in "civic affairs" (2).

As he has said, "There has never been a period in my mature life when I haven't made public appearances of some kind" (3).

The April, 1969, edition of *American Opinion*, contained an article entitled "Frame-up." Prior to the publication of this article, Respondent had written "articles and maintained a national 'Support Your Local Police' campaign" (4). The article was generated at a time of considerable public controversy over alleged police harassment ("FBI Director J. Edgar Hoover was writing about it, the Senate Internal Security Subcommittee was having hearings on it . . ." (5).

In late 1968, the article was commissioned by the managing editor of *American Opinion*, Scott Stanley, Jr. The impetus for the story was the indictment and trial in Chicago of a police officer, Richard Nuccio, for the murder of a youth, Ronald Nelson. The man chosen to investigate and write this assignment was Alan Stang, a free-lance writer who had previously done articles for Stanley and whose "reputation for accuracy with [Stanley] . . . has been the highest of any authority" (6). Stanley wanted Stang to learn if the "Nuccio murder trial and the publicity around it were a part of a continuing Communist effort to Blacken the reputation of America's police officers" (7). Nuccio's trial and subsequent conviction were hot issues at the time, and had been front page news in Chicago (8).

Stanley received Stang's manuscript on February 18, 1969, edited it, and then sent it to the printers within 24 hours (12). Prior to the publication of the article, Stanley did not know Petitioner and the only previous time he can remember hearing anything about Petitioner at all was a phone call received from Stang to discuss the article (9). Stanley made no independent investigation of the material contained in Stang's manuscript and based a caption and other references to "Frame up" in the April Edition solely on the information supplied by Stang (10). "Stang had written for defendant in the past, and Stanley had never had cause to question the contents of any article that Stang had written and to his knowledge there had not been any lawsuits arising out of Stang's articles" (11).

The result of Stang's investigation is the 18-page report, "Frame-up" which attempted to link Nuccio's trial with a Communist "war on police" (13) and alleged that Nuccio had been framed. Petitioner's name appears in four pages of the article (pages 4-6, and 12), and his picture is shown on page 9 with a caption authored by Stanley saying, "Elmer Gertz of Red Guild Harasses Nuccio."

Petitioner became a part of the article because he was counsel for the family of the victim of Nuccio's alleged crime. Petitioner had filed civil suits on behalf of the Nelson family against Nuccio and the city of Chicago, and he *had appeared at the coroner's inquest* where he ". . . asked questions of various witnesses . . ." (14). The inquest was the subject of considerable public interest and later led to the controversial indictment of Nuccio.

About 42,000 copies of said issue were made available throughout the *American Opinion* circulation list (15) and another 86,000 reprints of the article were later distributed throughout the country (16). Following the public dissemination of the story, Petitioner filed this libel action claiming misstatements therein had defamed him by inaccurately linking him with Communists which with other references was equal to saying he was a Communist or amounted to an inference that he was one.

QUESTIONS PRESENTED

Plaintiff's brief has injudiciously attempted to introduce new evidence, with the obvious purpose of producing bias, and to avoid determination of the issues in this case by a standard of equal justice under the law. Specifically, Plaintiff has spoken of alleged articles by Stang in publications connected with Defendant (pages 41-52 of Plaintiff's brief) and Defendant's false image as one who labels all adversaries Communists.

The questions presented by this appeal should have nothing to do with a publisher's political philosophy or how it has been expressed in the past; but rather with limits of constitutional freedom of speech. Only two basic questions are really presented by the appeal: (1) is Plaintiff a "public figure," and (2) did Defendant act with "actual malice" in publishing certain statements about Plaintiff? The cases clearly reflect, as will be presented herein, that the former is answered in the affirmative and the latter in the negative.

The questions posited by Plaintiff's brief will be answered by Respondent's propositions in order of importance. Respondent's brief will answer questions raised in Petitioner's brief, as follows:

I. Is Petitioner a person covered by the *New York Times* doctrine on libel?

II. Did Respondent act with actual malice?

III. Was Petitioner denied due process of law?

IV. Has Petitioner's right of privacy been destroyed?

V. Are attorneys entitled to special protection?

I. PETITIONER IS A PERSON COVERED BY THE NEW YORK TIMES DOCTRINE ON LIBEL.

The *Times* case (17) first enumerated the so-called "public official" rule which requires one so designated to show actual malice before he can recover for libel. Since that decision, other cases have expanded the definition of those who will be required to prove actual malice to collect damages for defamation. The *Times* spirit of a "profound national commitment to the principle that debate on public issues should be uninhabited, robust and wide-open . . ." has been found to include what has been progressively and chronologically characterized as three different areas: A. "public officials," B. "public figures" (18), and C. "matters of public interest" (19). Petitioner is clearly "public" within the spirit of the *Times* decision and any one of the three categories cited above could properly include Petitioner under the fact circumstances of this case.

A. Petitioner is a "public official."

Though Petitioner has held no elective or remunerative positions with the city, state or federal governments, he has been appointed to several jobs closely connected with government (20) and acted as a "de facto public official" by appearing, on behalf of the Nelson family, at the coroner's inquest upon the body of Ronald Nelson (whom Officer Nuccio was suspected of murdering) and questioning witnesses at a critical time in a proceeding that led to the prosecution of Officer Nuccio. "This inquest was held as authorized by Illinois statute, with expenses payable out of public funds, the purpose of which was to investigate the circumstances surrounding the death of Ronald Nelson so as to determine if a prosecution should follow" (21). After the inquest, Officer Nuccio was indicted for murder and Plaintiff filed several civil suits arising out of the alleged murder.

The Illinois Supreme Court in the *Turley* case (22) has indicated that the test for "public official" is whether or not Plaintiff "had such control and responsibility over governmental affairs, and was in such a position to significantly influence the resolution of issues of public interest as to require treatment as a public official."

The Petitioner is a well-known, highly experienced, and influential attorney within the courts of the country, his state, and (particularly) Chicago. It must be assumed that, when he appeared at the coroner's inquest and asked questions of various witnesses which led to his filing of several lawsuits, he exerted a significant amount of influ-

ence and control in delineating the circumstances surrounding the death of Nelson, which later resulted in Officer Nuccio's indictment for murder. By so doing, Plaintiff was "significantly influencing the resolution of issues of public interest" and acting as a "public official."

State courts have expanded the "public official" status to include a "senator" in student government on a state university campus and required him to show actual malice as to statements concerning him in a campus newspaper directed to "interested community" though caustic criticism and biting ridicule were used (23). The Petitioner is certainly much more analogous to a "public official" through his quasi-government connections, his appointive positions, his society status, and his active appearance at a notorious inquest than a young student who is part of the campus government.

B. Petitioner is a "public figure."

The *Walker* case (24) was the first decision which offered "public figure" as a definitive term to be applied to certain individuals precluding them from recovery in libel without a showing of actual malice. In enunciating their decision, the Court alluded to a balancing of prerogatives— ". . . the primary interest of the public is to insure that members of society are adequately equipped with knowledge to enable them to resolve all questions of public importance intelligently . . . responsible solutions to important political and social problems are subdued because citizens as well as news media are constrained to forego the expressions of their views when confronted with costly law suits . . . the paramount interest of society in receiving an

unrestricted flow of information concerning public matters is of fundamental importance, overriding the expense of a few tarnished reputations." (25)

Walker, though articulating the *Times* spirit as above, did not fully define "public figure," but rather indicated that the status was attained by position alone or by a "purposeful activity amounting to a thrusting of his personality into the 'vortex' of an important public controversy" (26). One of the reasons behind the *Walker* decision was the rationale that these "public figures" commanded "sufficient access to the means of counterargument to be able to expose through discussion any falsehoods" (27). Here Petitioner not only had access to the public media, he was consistently utilizing this entree to newspapers, radio stations, television stations, book publishers, and public forums (28). Plaintiff has "appeared very frequently" (29) on radio and television programs. In fact, as Petitioner says, "There has never been a period in my mature life when I haven't made public appearances of some kind" (30). Surely this is the classic "access" alluded to in the *Walker* case.

The lower courts have done much to complete the *Walker* definition of a "public figure." Thus, the following have been found to be included: (a) a nationally prominent individual (31); (b) a person who voluntarily entered the fray of public discussion on controversial issues of pressing public concern or interest (32); (c) a person who attempts to guide public policy (33). As is transparent from the Statement of the Case, *supra*, and Petitioner's own testimony (34), Plaintiff is a nationally prominent person

who voluntarily entered the fray of public discussion on a controversial issue when he undertook to be counsel for the Nelsons at the coroner's inquest and that appearance undoubtedly guided public policy and was so intended.

A recent Fifth Circuit decision (35) came very close to describing verbatim a person like Petitioner who was held to be a "public figure." The court found that a person who authors a book, makes many radio and television appearances, and who writes magazine and newspaper articles is thrust far enough into the 'vortex' of an important public controversy to be considered a "public figure" and subject to the *Times* rule for recovery for defamation (36).

The Supreme Court adopted and expanded on these lower court delienations in *Greenbelt* (37) bringing any person that voluntarily and actively enters the public scene within the purview of the *Times* decision.

State decisions have held that the chairman of a city Republican committee was at least a "public figure" and required to prove "actual malice" in publicity arising from work he performed for a state agency (38). Petitioner had been elected as a "delegate to the Constitutional Conventional Convention of Illinois" (39), was appointed by two Chicago mayors to the Housing Committee (40), was president of the Greater Chicago Chapter of the American Jewish Congress, and founder and president of the Shaw Society of Chicago (41).

A Minesota decision (42) has held that a complainant who for part of the time was an elected state representative

and, for the remainder, a well-known university professor, author, lecturer, and adviser to government, was at all times during the libel either a "public official" or "public figure" and was required to prove actual malice in charge that he was a Communist. Petitioner has been on several of the commitees of the Chicago Commission on Human Relations and was on the advisory committee to the Chief Justice of the Municipal Court of Chicago. He is on the "Speakers' Bureau of the Adult Education Council and several times a year they secure bookings for . . ." him (43). Petitioner has written at least three books: *Frank Harris: A Study in Black and White; A Handful of Clients;* and, *Moment of Madness: The People* v. *Jack Ruby* (44).

"Public figure" was defined in New York to be a person who publicly, conspicuously, actively, and, as a leader, thrust himself into a public discussion of public and controversial matters (45). Also the law partner of a mayor (45) and a professor who made statements on a nuclear test ban treaty (47) have been held to be public figures subject to the *Times* rule.

C. The subject of the alleged libel is a matter of public interest.

As previously mentioned, to fall within the "public figure" classification, one must thrust himself into the vortex of an important public controversy. But, as the definition of those who could be commented on within the framework of *New York Times*, and the spirit of that case was developed, the scope of that decision was seen as encompassing an individual not necessarily in the "vortex" who, however, in some manner involved himself in a pub-

lic controversy (48). The test under the public interest category became whether the controversy is of sufficient public interest to warrant constitutional protection, regardless of the individual's position in the community (49).

The Supreme Court formally adopted the expanded latitude implicit in these lower court decisions in the *Rosenbloom* decision (50). This case honored the "commitment to robust debate on public issues, which is embodied in the First Amendment, by extending constitutional protection to all discussion and communication involving matters of public or general concern, without regard to whether the persons involved are famous or anonymous" (51).

Again, this was not a departure from the *New York Times* doctrine, but rather a logical continuum of the spirit and rationale thereof. Basically, this reasoning is a weighing of contrasting rights with the emphasis extended to the primal position society has given to freedom of speech and press (52). Where the public has a legitimate general interest and personal concern in the matter involved, it has a right to know or be informed about the matter (53). "Discussion and debate cannot be healthy if the public is not given the opportunity to weigh all the facts in arriving at a conclusion of legitimate public interest. Thus, freedom of discussion, in order to fulfill its historic function in this nation must embrace all issues about which information is needed to enable the members of society to cope with the exigencies of their period" (54). An individual, even though on the periphery of a controversy, may be subject to the *Times* privilege if he is sufficiently connected with the subject issue (55).

Petitioner was hardly on the far edge of the controversy over the Nelson death, which involved a controversy over possible harassment of policemen. The test for public interest in the matter seems more clearly met under the facts of this appeal than in those cases cited above. The public debate over harassment of policemen had been carried on in many journals (56) and was and is an issue of the highest public interest.

II. RESPONDENT DID NOT ACT WITH MALICE

Being an individual covered by *New York Times* does not automatically preclude recovery for libel nor provide blanket immunity to one's adversaries. If malice can be shown (as it was in *Butts*), the complainant can succeed. The malice required for the *Times* situation must be proven by either showing that: the publisher actually knew the alleged libel was false prior to publication (57); or, the publisher entertained serious doubts as to the truth of the publication prior thereto (58).

In proving either of these standards, the complainant has a heavy burden (59), which is not met by merely proving the issue by a preponderance of the evidence. The complainant must demonstrate actual malice by clear and convincing proof (60). Thus, even erroneous statements of both fact and opinion, as long as made in good faith, are privileged (61). Mere intent to inflict harm without knowledge of the falsity of the statement is insufficient (62).

What evidence has been presented below on the two criteria of malice? Respondent had never heard of Petitioner prior to the article. Respondent made no inde-

pendent investigation of the charges contained in his agent's story, but merely received it, edited it, and within 24 hours sent it to the printers. Respondent indicated below that he had no independent knowledge concerning the alleged libelous adjectives used to describe Petitioner, but Respondent did say he was familiar with some of the information contained in the article (63). No indication is in the record below that Respondent ever entertained any doubts (let alone, serious ones) concerning the veracity of the charges contained in the article. Quite the contrary, Respondent had full faith and confidence in the free lance writer whom he'd found to be trustworthy in the past.

The *Times* rule protects a publisher even though statements are not valid beyond question and are not an objective picture of reported events. Also a reporter may rely on a single source even though it reflects only one side of a controversy and failure to retract is not evidence of actual malice (64). That Respondent did not check the free lance writer's article may have been negligent, but failure to investigate does not, in itself, establish bad faith (65). Malice in the publication of an article coming within the *Times* privilege may not be presumed or inferred from the nature of the defamatory statement nor may it be inferred from the failure to seek out the complaining party to verify facts before publication (66). Some state courts have even concluded that a failure to make a prior investigation does not constitute sufficient proof to present a jury question as to whether the publication was a reckless disregard of whether the statements were false or not. In a paraphrase of some Supreme Court language, an Ohio court (67) has

held that before a jury question is raised sufficient evidence must be introduced to permit the conclusion that the allegedly libelous party entertained serious doubts as to the truth of the statements prior to publication.

Some courts have divided up the malice issue into two requirements. The first is that the falsity must be egregious and must relate to specific incidents (68). To call someone a "Leninist" or "Communist-Fronter" in the present era may not be prominently in bad taste except in a relatively small segment of society. Assuming that it is egregious, some states have held that rhetorical hyperbole or vigorous epithet used to describe what the publisher believes to be his subject's unreasonable position is not libelous (69). The case herein appears analogous.

Going a step further and assuming that Respondent's language fails the first test stage, no evidence has been presented that Respondent knew the statements were false or that Respondent was aware of any factor which would permit the court to conclude that he had serious doubts as to the truth of the publication. This is the second stage. The Respondent's actual state of mind is the key in determining whether this step is met or not (70). "The publisher is not required to hold his press until all possible knowledge is secured . . . the state of mind required for actual malice cannot be imputed and, therefore must be shown to exist within the person having responsibility for the publication of the defamatory statement. It is not what he should, in the exercise of due care, have believed about the truth of his statements, but what he in fact did believe about them that is relevant. In this regard more must be

shown than that the Defendant spoke with only slim evidence supporting the truth of his statement (71), made incorrect statements (72), had no personal knowledge of the subject matter of the statement (73), was a political opponent of the plaintiff (74) . . . lacked conviction of the truth of his statements or entertained a neutral state of mind in that regard (75) or made a negligent or sketchy investigation into the truth of the publication (76)" (77).

Petitioner's brief (page 40) makes the false claim that he had been called a "Communist," and complains that no attempt was made below to prove the truth of the allegedly libelous statements; but a review of the actual language will reveal that he was not called a "Communist," although the record reveals that Respondent was prevented from raising truth as a defense at trial, the real issue is whether Respondent knew the statements, as made, were false or had serious doubts concerning their truthfulness before publishing them? In *Rose* (78), it was correctly concluded that malice could not be inferred from Respondent's unsuccessful attempt to prove the truth.

Petitioner's comments on Respondent's reputation have been treated earlier in this brief, but are mentioned here again because Petitioner has entered this attack on Respondent in a section labeled "Respondent Guilty of Actual Malice." Whatever Respondent's reputation is or was, it is wholly irrelevant to this case as the trial court properly ruled and the insertion of these charges at this stage is a blatant attempt to inject alleged past wrongs, to influence the decision in this case.

Petitioner has presented as his "chief evidence of gross recklessness" (page 44) that Respondent continued to distribute articles after the filing of the complaint. It would appear that this contention was excluded by the act of Petitioner at the trial, as recognized in the opinion of the Court of Appeals, ". . . defendant offered evidence for the purpose of proving a good faith post-complaint attempt to verify the charges, and *plaintiff persuaded the court to exclude such evidence* on the ground that '. . . *anything done after the publication* of the article [is] *entirely irrelevant to these proceedings*' " (79).

Petitioner also mentions Stang's reputation and argues that Respondent should not have trusted same. Besides the rebuttal already offered on this point, a court of appeals decision (80) has held that proof of isolated instances of inaccuracy of a reporter are not sufficient to require the publisher to investigate the reporter's stories.

Finally, the trial judge who heard all the evidence concluded that ". . . Stanley clearly did not act with actual malice or with reckless disregard for the truth" (81).

III. PETITIONER WAS NOT DENIED DUE PROCESS.

Petitioner, in a rather contradictory argument, labeled "Petitioner Was Denied a Fair Trial and Due Process," contends first that he was not given a "full and fair opportunity" (page 49) to present evidence of malice and then argues "there is much undisputed evidence in the record . . . to show either actual malice or gross recklessness" (page 51). The only evidence Petitioner offers that he would add at a new trial is his opinion that Re-

spordent has acted irresponsibly in the past. As suggested earlier herein, that type of evidence has no bearing on the case or the issue of actual malice. As the appeals court, such evidence might even tend to buttress Respondent's claim of lack of knowledge. "Plaintiff does not contend that Stanley knew him or anything about him when the article from Stang was received. At most the 'Eisenhower' evidence tends to prove that Stanley would be less disposed than another editor to question the author's characterization of plaintiff" (82). As to Petitioner's contention that he was not allowed to explore the malice issue, Petitioner himself (as quoted above) indicated that his evidence of malice was received by the trial court. "Plaintiff did present evidence of malice (both the 'constitutional' and the 'ill will' type) to support his damage claim and no such evidence was excluded; at least he points to no occasion when he made an offer of proof of relevant evidence which was refused" (83).

Even if Petitioner were to introduce his "Eisenhower" evidence the most it might prove, if true, is background concepts, which do not amount to actual malice in the sense of knowing falsity or reckless disregard for the truth (84).

IV. PETITIONER'S RIGHT OF PRIVACY HAS NOT BEEN DESTROYED.

Petitioner contends his right of privacy has been "destroyed" (page 16). This is certainly hyperbole. The most that can be said is that Petitioner's right has been appropriately diminished (not razed) by the public's right of free speech and press. Because Petitioner was able to proceed on a theory of libel *per se* [possibly erroneously under

the changing climate of public acceptance of differing views and court decisions such as *Yates* (85), *Scales* (86), *Robel* (87), and especially *Raible* (88) which, *inter alia*, said calling a person a bigot, or other appropriate name descriptive of political, racial, religious, economic or sociological philosophy gives rise to no action for libel *per se*], he presented no evidence of damages other than the specious claim that belief in Communism ". . . would mean you did not believe in the institution of private property and I don't see how you could represent a client properly in wills, disputes over real estate . . ." (89). Or how any socialist lawyer could do the same? Or any lawyer represent a murderer? Does an attorney have to believe in murder—or private property for that matter—to know how to properly deal with cases involving these subjects? If Petitioner's new evidence is to be believed (surely Petitioner believes it), what harm to Petitioner's right of privacy has followed from his being lumped with Eisenhower, Nixon, and Humphrey (90) by the organ of John Birch Society which group the Petitioner claims to be totally and notoriously irresponsible?

The Petitioner has tried to buttress his right of privacy argument by ludicrous exaggeration. He has attempted to picture himself as an ". . . obscure, unknown individual caught up in the maelstrom of some issue in which the public may be interested, not of his own making" (91). Such a characterization is completely at odds with Petitioner's own testimony and complaint. Nonetheless, Petitioner (from this untenable position) argues that he has no other recourse but a vain lawsuit. Again, this is *contra* to Peti-

tioner's own testimony as to his constant and continual exposure to every media form.

Finally, Petitioner's proposal of probable cause, as the standard to be used rather than malice, would undoubtedly result in a tremendous broadening of the liability of the nation's press. This is precisely the danger sought to be avoided by the *New York Times* decision, i.e., a fettering of the press by libel suits or their threat and the consequent diminution of public awareness. The probable cause standard proposed will amount to prior censureship in its logical final form because it cannot in practice be subjective. The courts (as in criminal matters) would determine the existence of probable cause. Editors would then be required to proceed at their own peril or await the costly errors of others to learn the applicability of probable cause to the myriad of journalistic situations. Like a seach warrant, would journalists have to obtain prior judicial authority upon a showing of probable cause in order to publish? This is censorship.

As previously cited, courts have necessarily weighed the equities involved and decided that "society places a primary value on freedom of speech and press" (92) to the extent that actual malice is required in a *New York Times* situation before one libelled may recover.

V. ATTORNEYS ARE NOT ENTITLED TO SPECIAL PROTECTION.

Petitioner has attempted to carve out of the *New York Times* concept of First Amendment Freedom of Press a special exception which he deems merited by lawyers because of their attorney-client relationship. First, Petitioner

is ignoring many of the facts of the present case, in that Petitioner is and was a public figure in his own right without reference to any of his cases, at the time he entered the *Nuccio case*, and participated in the inquest that produced an indictment of Officer Nuccio. Second, the statements in the article were mostly based on the Petitioner's undisputed membership in various organizations, and his public utterances and reputation. The caption Stanley wrote specifically cites the "Red Guild" and it is just this type of characterization which forms the basis of Petitioner's charge that he was libelled.

Why should attorneys be allotted a privilege others do not share, especially the anonymous individual who is involuntarily thrust into a "public issue." In *Time, Inc.* v. *Hill*, 385 U.S. 374 (1967), a rather anonymous family held captive by a group of escaped convicts were held to be within the *New York Times* purview to protect the public's right to information concerning newsworthy matters. *Ocala Star-Banner Co.* v. *Damron*, 401 U.S. 295 (1971), applied the *New York Times* rule to public officials even when the defamatory remarks involved private libel. Why should an attorney, who, more than the average citizen, has the means and the access to respond to libel, be given special protection over the others? Attorneys in notorious cases, in this day of massive media coverage of famous trials, are especially given almost daily opportunity to "publicly try" their case or comment to an enormous public audience?

Petitioner might have had a stronger position under this argument were he defending a murderer, and Respondent had urged that, because Petitioner was so employed, he believed in murder; but that is not the case

here. Respondent has made a political charge that Petitioner was somehow involved in a Communist war on police either as a dupe ("Communist-fronter") or as a sympathizer ("Leninist") because of Petitioner's participation in a controversial case. Respondent has not said that Petitioner is a criminal or has committed a crime by association with any case Petitioner defended or that Petitioner, simply by representing his client, believed in whatever his client is supposed to have done. In fact, neither Petitioner nor his client is even a target of the article. The story dealt generally with harassment of police and specifically with the trial of one police officer. Petitioner was only mentioned in the article: first, because he had participated in the Nuccio inquest which led to the officer's indictment and filed civil suits against Nuccio and the police; and second, because of his alleged associations, organization memberships, *etc.* Without either of these, he would probably have never been a character in the article.

Attorneys do not have to take every case that comes their way. Certainly an attorney who takes on a notorious case with political overtones is well aware [especially if (like Petitioner), he has had past famous trials] that he is likely to be associated with the political philosophy (but not necessarily the conduct) of those he represents. Is this not fair comment to be expected, especially if an attorney continues to represent notorious clients of one political persuasion?

If all of Petitioner's argument is granted, what is left of the case? Petitioner has been labelled a "Leninist" and a "Communist-fronter," not a Communist. Assuming Peti-

tioner is neither a Leninist nor Communist-fronter, how has he been damaged? As is argued elsewhere herein, even calling a person a Communist should not be considered libelous *per se* (94). It would seem more reasons exist for not so considering the words used by Respondent. Petitioner has been charged with holding a certain political philosophy, albeit that once espousing such a philosophy might have been a crime, it is not now a crime. Surely some Democrats (or Republicans) exist who would consider themselves libeled if called a Republican, but they would still have to prove damages to maintain a libel action. Would it be libelous to call an attorney who continually represented unions, a union lawyer? Or, to call an attorney who represents right-wing clients and who supports right-wing causes with his public associations and utterances, a right-wing lawyer?

The only evidence offered by Petitioner on damages goes *contra* to his argument herein. He has said that he was defamed because if he were a Communist he would not believe in private property and thus could not handle property cases. But this is just the opposite of his argument here, *i.e.*, that an attorney's philosophy has nothing to do with the jobs he takes nor with his ability to handle those jobs. The latter, the Respondent readily concedes (you do not have to believe in the law to know and use it). As to the former, the Respondent would answer "not necessarily" because an attorney does have control over the cases he tries. In any case, Petitioner has not shown any damages, nor is it likely he could, especially in view of the low esteem he claims society holds for Respondent.

Finally, to make an exception here would open the door to a logical extension to others. The expansion fostered thereby would create the chill on freedom of the press which the court has been attempting to prevent, through the *New York Times* decision and those cases which followed it.

SUMMARY

This case presents no new issues to the Court. The fact situation, which clearly spells out Petitioner's noted status within society, places Petitioner well within the confines of the *New York Times* family of cases, either as a "public official," "public figure" or as an individual caught up in a matter of "public interest" or all three.

Thus, Petitioner must prove that Respondent acted with malice. That is, that Respondent knew the statements were false or entertained serious doubts as to their truth. No evidence has been offered either at trial or thereafter tending to show Respondent acted with the malice required. In fact, all the evidence is to the contrary to such an extent, the trial judge held, ". . . no jury could reasonably find that defendant acted with actual malice." (93)

Respectfully submitted,

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May, 1973

BIBLIOGRAPHY

(1) Transcript of the case, page 131; Supplemental Appendix, page 36.

(2) *Gertz* v. *Welch*, 322 F.Supp. 997 at 998 (U.S. Dist. Ct. N.D. Ill., Dec. 8, 1970).

(3) Tr. p. 123; S.A., p. 29.

(4) *Id.*, 186.

(5) *Id.*, 189. See also Tr. 138-139; S.A., p. 43.

(6) Appendix, "Stanley-Cross," page 46.

(7) Tr. 185.

(8) See Defense Exhibit D.

(9) Appendix, "Stanley-Cross," page 39.

(10) *Id.*, p. 40.

(11) *Gertz, supra*, at 999.

(12) Appendix, "Stanley-Cross," page 48.

(13) *American Opinion*, April, 1969, contents page.

(14) Appendix, "Gertz-Direct," page 86.

(15) *Id.*, "Stanley-Cross," page 53.

(16) *Id.*, page 55.

(17) *New York Times Co.* v. *Sullivan* (1964), 376 U.S. 254, 11 L.Ed.2d 686, 84 S.Ct. 710.

(18) *Curtis Pub. Co.* v. *Butts; Associated Press* v. *Walker* (1967), 388 U.S. 130.

(19) *Rosenbloom* v. *Metromedia, Inc.* (1971), 39 U.S.L.W. 4694, 415 F.2d 892 (3rd Cir. 1969), 289 F.Supp. 737 (E.D. Pa. 1968).

(20) Tr. 119-123; S.A., pages 25-27.

(21) "Defendant's Brief in Support of Motion for Judgment Notwithstanding the Verdict and in Alternative for New Trial," No. 69-C—1288 in U.S. Dist. Ct. for N.D. of Ill., page 10.

(22) *Turley* v. *W.T.A.X., Inc.* (1968), 236 N.E.2d 778.

(23) *Klahr* v. *Winterble* (1966), 4 Ariz. App. 158, 418 P.2d 404.

(24) *Associated Press* v. *Walker* (1967), 388 U.S. 130.

(25) "Public Official and Actual Malice Standards: The Evolution of New York Times v. Sullivan," Iowa L.Rev., Vol. 56, p. 396, commenting on *Butts* decision; See also "The Scope of the First Amendment Protection for Good Faith Defamatory Errors," 75 Yale L.J. 642 (1966); Berney, Libel and the First Amendment—A New Constitutional Privilege, 51 Va. L.Rev. 1, 45-47 (1965).

(26) *Curtis Pub Co., supra.*

(27) 1 Hansen, "Libel & Related Torts" (1969), at 108.

(28) Tr. 122-126; S.A., pages 28-31.

(29) Tr. 124; S.A., page 30.

(30) Tr. 123; S.A., page 29.

(31) *Walker* v. *Courier-Journal & Louisville Times Co.*, 246 F.Supp. 234 (W.D. Ky. 1965).

(32) *Pauling* v. *Globe-Democrat Pub. Co.*, 362 F.2d 188, 195, 197 (8th Cir. 1966), *cert. denied*, 388 U.S. 909 (1967).

(33) *Id.*

(34) See Plaintiff's complaining petition and his testimony at trial.

(35) *Dacey* v. *Florida Bar, Inc.*, 427 F.2d 1292 (1970 U.S. C.A. 5th Cir.).

(36) See *Konigsberg* v. *Time, Inc.*, 312 F.Supp. 848 (S.D. N.Y. 1970).

(37) *Greenbelt Cooperative Pub Ass'n* v. *Bresler* (1970), 398 U.S. 6.

(38) *News-Journal Co.* v. *Gallagher* (1967), 233 A.2d 166 (Del.).

(39) Tr. 123; S.A., page 27.

(40) Tr. 120-121; S.A., pages 26-27.

(41) Tr. 119; S.A., page 25.

(42) *Rose* v. *Koch* (1967), 278 Minn. 235, 154 N.W.2d 409.

(43) Tr. 122; S.A., page 28.

(44) Tr. 101; S.A., page 10.

(45) *Pauling* v. *National Review, Inc.* (1966), 49 Misc.2d 975, 269 N.Y.S.2d 11.

(46) *Gilberg* v. *Gaffi*, 21 App.Div.2d 517, 251 N.Y.S.2d 823 (1964), *aff'd*, 15 N.Y.2d 1024, 260 N.Y.S.2d 29 (1965).

(47) *Pauling* v. *Globe-Democrat Pub. Co., supra.*

(48) *Bon Air Hotel, Inc.* v. *Time, Inc.* (1970), 426 F.2d 858, 862, 5th Cir.

(49) *United Medical Laboratories, Inc.* v. *C.B.S.* (1968), 404 F.2d 706 (9th Cir.); *cert. denied*, 394 U.S. 921 (1969).

(50) *Rosenbloom, supra.*

(51) *Id.*, at 4699; See also T. Emerson, "The System of Freedom of Expression."

(52) See *Thornhill* v. *Alabama* (1940), 310 U.S. 88, 101, 102, as cited in *Rosenbloom, supra;* Also *Time, Inc.* v. *Hill* (1967), 385 U.S. 374, 388, 87 S.Ct. 534, 542, 17 L.Ed.2d 456.

(53) See *United Medical Laboratories, supra.*

(54) "Public Official & Actual Malice Standards: The Evolution of the New York Times v. Sullivan," *supra* at 398.

(55) *Bon Air Hotel, supra,* at footnote 31.

(56) Tr. 139-140; S.A., pages 43-44.

(57) *Times, supra.*

(58) *Times, supra;* See also *Ragano* v. *Time, Inc.* (1969), 302 F.Supp. 1005 (M.D. Fla.); *Time, Inc.* v. *McLaney* (1969), 406 F.2d 565 (5th Cir.); *cert. denied,* 395 U.S. 922 (1969); *Time, Inc.* v. *Pape* (1971), 401 U.S. 279.

(59) *Championship Sports, Inc.* v. *Time, Inc.* (1972), 336 N.Y.S.2d 958.

(60) *Wasserman* v. *Time, Inc.* (1970), 424 F.2d 920 (D.C. Cir.); *United Medical Laboratories, supra; Cerrito* v. *Time, Inc.,* 302 F.Supp. 1071 (N.D. Cal. 1969).

(61) *Bon Air Hotel, supra,* at 861, note 2.

(62) *Garrison* v. *Louisiana* (1964), 379 U.S. 64.

(63) Appendix, *supra.*

(64) *New York Times Co.* v. *Connor* (1966), 365 F.2d 567 (Ala.)

(65) *Airlie Foundation, Inc.* v. *Evening Star Newspaper Co.* (1972), 337 F.Supp. 421; See also *Belli* v. *Curtis Pub. Co.,* 102 Cal.Rptr. 122, 25 C.A.3d 384.

(66) *Schwartz* v. *Time, Inc.,* 337 N.Y.S.2d 125 (1972).

(67) *Dyre* v. *Mansfield Journal Corp.* (1972), 288 N.E.2d 856, 32 Ohio Misc. 70.

(68) *St. Amant* v. *Thompson* (1968), 390 U.S. 727.

(69) *Redding* v. *Carlton* (19____), 296 A.2d 880.

(70) *St. Amant, supra,* at 733.

(71) *Beckley Newspaper Corp.* v. *Hanks* (1967), 389 U.S. 81, 84.

(72) Certainly present in all of the *Times* series of cases, but not actionable unless libeling party had serious doubts as to the correctness of the statement.

(73) *St. Amant, supra*, at 730.

(74) *Id.*, at 728.

(75) *Id.*, at 731.

(76) *Arizona Biochemical Co.* v. *Hearst*, 302 F.Supp. 412, 418 (S.D.N.Y. 1969).

(77) "Public Official and Actual Malice Standards . . . ," *supra*, at 403-404.

(78) *Id.*, footnote 26.

(79) *Gertz* v. *Welch, Inc.*, Nos. 71-1174, 71-1175 (U.S.C.A. 7th Cir., Aug. 1, 1972), page 10, footnote 15.

(80) *Washington Post Co.* v. *Keogh* (1966), *cert. denied* (1967), 365 F.2d 905 (C.A.D.C.), 385 U.S. 1011, 17 L.Ed.2d 548, 30 A.L.R.3d 972.

(81) *Gertz* v. *Welch, Inc.* (1970), 322 F.Supp. 997 at 999.

(82) *Id.*, at footnote 65.

(83) *Id.*

(84) *Reaves* v. *Foster* (1967), 200 S.2d 453; *Henry* v. *Collins* (1965), 380 U.S. 356, 13 L.Ed.2d 892, 85 S.Ct. 992.

(85) *Yates* v. *U. S.* (1967), 354 U.S. 298, 77 S.Ct. 1064.

(86) *Scales* v. *U. S.*, (1961), 367 U.S. 203, 81 S.Ct. 1469.

(87) *U. S.* v. *Robel* (1967), 389 U.S. 258, 88 S.Ct. 419.

(88) *Raible* v. *Newsweek, Inc.*, 341 F.Supp. 804 (D.C. Pa. (1972).

(89) Tr. 119; S.A., page 25.

(90) Page 46 of Petitioner's brief.

(91) *Id.*, page 29.

(92) *Time, Inc.* v. *Hill, supra.*

(93) See footnote 81, *supra,* at 1000.

(94) *U. S.* v. *Yates* (1957), 354 U.S. 298; *Scales* v. *U.S.* (1961), 367 U.S. 203; *Noto* v. *U. S.* (1961), 367 U.S. 290; *Communist Party of U. S. A.* v. *Subversive Activities Control Board* (1961), 367 U.S. 1.

CERTIFICATE OF SERVICE

This is to certify that service of Brief of Respondent, to which this certificate is attached, was made this _____ day of May, 1973, by mailing three copies hereof, postage fully paid, to:

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C. J. Watts

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-617

ELMER GERTZ,

Petitioner,

vs.

ROBERT WELCH, INC.,

Respondent.

REPLY BRIEF OF PETITIONER ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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The "Statement of the Case" in Respondent's Brief is no more than a superficial and slanted statement of a very few of the facts of this case intended to mislead this Court as to the nature of what is before it. Respondent compresses all of the activities of Petitioner's lifetime into a few sentences in an attempt to indicate that Petitioner was a figure who was constantly in the public view. A reading of the record in this case indicates that this is not true.

Respondent refers to various books written by Petitioner and to certain positions he has held as a concerned citizen. Respondent deliberately attempts to mislead the Court into believing that these activities were contemporaneous with the defamatory publication. In fact, they were of ancient and forgotten vintage. For example, one of the books referred to was published forty years before the libelous publication and had a very modest circulation then and not at all since then; the other books were published several years prior to the Stang article; none had a large circulation. The organizations Petitioner had headed and the citizens committees on which he served went back to periods ranging from a few years to decades prior to the publication.

What is worse, Respondent gives the impression that Petitioner was a delegate to the Illinois Constitutional Convention at the time of the publication, despite being advised that it was afterwards and that Petitioner had not even contemplated running until after suit was filed. This is characteristic obfuscation of the facts and issues. It is upon such confusion that Respondent depends. Petitioner may not have been a mine-run person, but that does not make him a public figure in the constitutional sense. He is entitled to the protection of recognized laws applicable to all private persons, particularly when to treat him otherwise would adversely affect the rights of his clients.

As was testified by Petitioner, with no contradiction, he had been involved in no public activities for a considerable period of time prior to the publication of the article in question. He had been involved in no activities relating in any way to the alleged harassment of the police.

More will be said regarding this in reply to the various arguments raised by Respondent. Suffice it to point out at this juncture that the architect of the article in question, Respondent's Managing Editor, Stanley, testified at trial that prior to the publication of the article he had not known Petitioner, whose name had been mentioned to him only in passing by the author, Stang, in a telephone conversation. This admission destroys any contention that Petitioner was so well known that the very mention of his name would excite the interest of the public or of a publisher. Certainly at the time that it published the article, Respondent could not have discussed someone unknown to it in the vein that he was a public figure.

Respondent's version of the questions presented in this cause are a complete distortion of this matter. The central issue is whether Petitioner, for whatever reason, should be required to prove actual malice on the part of Respondent in order to recover an award of damages for libel. Petitioner contends, of course, that such a ruling in this case will destroy the law of libel and leave all private citizens at the mercy of unscrupulous publishers, and will not further the public's right to the free flow of information as guaranteed by the First Amendment.

If, however, it is determined that Petitioner is required to prove actual malice, the issue then becomes whether he was given an opportunity to prove actual malice as first defined in *New York Times*. The record shows, without doubt, that Petitioner was not given such an opportunity, and at the very least, he should be awarded a new trial in order to meet that standard of proof. More, malice may have been established here as a matter of law.

Respondent's contention that Petitioner is a public official is without adequate foundation. It is undisputed that at the time of the article, and for a considerable period of time previous thereto, he had had no connection with government or governmental agencies; nor was it stated in the article that he had any such connections at the time of the incident being discussed, nor was the article written in the light of any such contention.

Petitioner's appearance at the inquest into the death of Ronald Nelson did not transform him into a public official. He participated, in a limited way, as a private attorney on behalf of private clients, the parents of the slain youth. The fact that this proceeding was held pursuant to State statute, as are all judicial proceedings in the State of Illinois, whether civil or criminal, has absolutely no bearing upon the matter. He was only one of many persons who participated. He held no official capacity whatsoever. Only the staffs of the Coroner and State's Attorney had official connection with the matter. Furthermore, this inquest did not lead to the indictment of Officer Nuccio. The Coroner's Jury returned an "open" finding—indicating that they could reach no conclusion whatsoever. Such a finding shows that Respondent's argument that Petitioner's participation "significantly influenced the resolution of issues of public Interest" is entirely without foundation. The eventual indictment of Officer Nuccio was returned by the Grand Jury, with absolutely no impetus from Petitioner whatsoever. Nor did Petitioner have anything to do with the trial or conviction of Nuccio.

There is no foundation for the conclusion that Petitioner is a public figure. He made no public statements concerning the Nuccio matter. He was never quoted or

discussed in any newspaper article regarding the criminal proceedings involving Nuccio. He took part in none of the Nuccio criminal proceedings. Significantly, Respondent's article made no attempt to show that Petitioner was actually involved in those criminal proceedings. As has been pointed out time and time again, Petitioner acted inconspicuously, in a purely private capacity, representing private clients. Aside from Petitioner's limited participation in the inquest, Respondent's article made no reference to any actions by Petitioner, other than the fact that he had filed civil suits on behalf of his clients.

Petitioner took no action which could be construed as having thrust himself into the vortex of any public controversy. In fact, there was no public controversy. Any controversy was the complete invention of Respondent, and its false theses regarding a Communist conspiracy to frame an allegedly innocent police officer. A more accurate description of the situation would be to say that Petitioner was dragged unwillingly into a false vortex wholly of Respondent's making. This cannot be sufficient to transform Petitioner into a public figure, otherwise every defamer can create his own escape hatch and all wronged persons are powerless to ask for redress.

In any event, Petitioner was not spoken of in a public capacity in the article. None of his public actions or activities were discussed. Nothing was said about what he had done publicly in connection with Nuccio. None of his questions at the inquest were quoted. Virtually every statement concerning Petitioner had something to do with organizations to which he had allegedly belonged years earlier. What does this have to do with the public's right to know about the prosecution of Officer Nuccio?

Absolutely nothing. Petitioner had nothing to do with that prosecution. Any mention of him in connection with it was wholly the figment of Respondent's imagination, or of that of its staff author, and, therefore, malicious.

Nor was Petitioner so well known as to have become a public figure by virtue of his very existence. Respondent's argument in support of this thesis is without force. Petitioner's alleged association with the organizations mentioned in Respondent's brief (p. 9) was untrue in virtually every instance or had ceased years before the article was published, and none of the few organizations to which Petitioner belonged was communistic. His connection with the Illinois Constitutional Convention occurred after the article was published. Furthermore, none of these alleged public activities was mentioned in the article in connection with Nuccio. While placing the utmost importance upon them now, Respondent did not think them important enough to note in its article, contenting itself with stating: "In fact, the only thing Chicagoans need to know about Gertz is that he is one of the original officers, and has been Vice President of the Communist National Lawyers Guild . . ." (Article, p. 6) Petitioner had not been a member of this organization for over fifteen years, and when he belonged to it the organization numbered among its other members and supporters, persons who were, or became, high public officials, including justices of this Court.

Finally, Respondent's managing editor had never heard of Petitioner until he saw the article. None of the prospective jurors in this case—residents of Petitioner's own town wherein it is alleged he had the most influential status—had ever heard of Petitioner. This is the very antithesis of a public figure.

Surprisingly, Respondent devotes almost no discussion to that issue which is the most critical in this case—whether Petitioner's involvement, however slight, with a matter which is arguably the subject of public interest, is sufficient to require him to prove knowing falsity or reckless disregard on the part of Respondent. It was upon this basis that the Court of Appeals held that Petitioner was required to prove malice in the Constitutional sense. Respondent is content to cite *Rosenbloom* v. *Metromedia,* 403 U.S. 29, 91 S.Ct. 1811 (1971), as having settled this issue. However, only three of the Justices of this Court agreed upon the approach that the rule of the *New York Times* be extended to any matters involving public or general concern. A failure of the majority of the Justices of this Court to adhere to that proposition, "prevents the case from becoming an authority for the determination of other cases, either in this or in inferior courts." *Hertz* v. *Woodman,* 218 U.S. 205 (1909). See also *United States* v. *Pink,* 315 U.S. 203 (1941); *Dorr* v. *United States,* 195 U.S. 138, (Concurring Opinion of Justice Peckham).

The failure of a majority of the Justices of this Court to agree upon a single approach to this problem highlights its difficulty. Petitioner has attempted to set forth a rational discussion of that problem in his main brief. An accommodation must be made between the strongly competing policy interests which vie for attention in this area. Petitioner has suggested such an accommodation. Respondent has not seen fit to reply to that argument, being content to state bare conclusions. We respectfully refer this Court to pages 16ff of our brief.

Contrary to Respondent's contention (Respondent's Brief, p. 12), Petitioner was indeed on the far edge of

the controversy over the criminal trial of Officer Nuccio. That article dealt essentially with the criminal prosecution of Officer Nuccio. The false innuendos and snide comments contained in that article to the contrary, Petitioner had absolutely nothing to do with that criminal proceeding. He was not a legitimate party to a discussion of it, and should not be held to the criteria as set forth in *New York Times*. There was some little publicity about the Nuccio case, none of it involving Petitioner. This was no *cause celebre,* just another case in which an individual policeman used more force than permitted by law.

Both the District Court and the Court of Appeals held that Petitioner had not sufficiently proved actual malice on the part of Respondent. What they overlooked is the undisputed fact that at no time was Petitioner required or given an opportunity, to do so. He was informed throughout pre-trial discovery, and at trial, that this case would proceed along traditional lines of libel, and that the *New York Times* standard was not to be applied. Then, after the trial was concluded, it was held, retroactively, that Petitioner failed to prove malice. Respondent now castigates Petitioner for not making an offer to prove such actual malice. (Respondent's Brief, p. 17) What would be the occasion for making such an offer? Must one present unnecessary evidence when he has been informed that he need not do so?

Without even attempting to do so, however, Petitioner did in fact introduce evidence which is sufficient to indicate actual malice on the part of Respondent, as a matter of law under the appropriate rules, as discussed in Petitioner's main brief (pp. 39ff). Stanley, Respondent's managing editor, personally vouched for information which he had no reason to believe was true. Absolutely

no attempt was made to verify any of the information, and the article was rushed into print (in a monthly magazine) in the extraordinarily short time of 24 hours. This is the height of irresponsibility. Indeed, it was Stanley, in light of his preconceived policy line of finding a Communist in every nook and cranny, who dispatched the author with instructions as to the kind of story he was to write—a story which was preconceived and concocted before one fact had been investigated. If the story had not agreed with this pre-conceived Communist-plot thesis, it would not have been printed at all. It was not that Stang had a reputation for accuracy, but that he echoed Stanley's Birchite viewpoint, which is completely contemptuous of the facts. "American Opinion" knowingly published fiction which it labeled as fact.

Even after Respondent was put on notice of the falsity of the article by service upon it of the Complaint in this matter, it continued to distribute the defamatory story, both in magazine and reprint form, for almost a year. This is clearly malice as a matter of law. What more malice could be required? Such a series of events, despite Respondent's protests of having a mind as blank as a *tabula rosa,* is the height of irresponsibility, and cannot be countenanced in a free society. This evidence establishes malice under the rules set down in *Curtis Publishing Co.* v. *Butts,* 388 U.S. 130 (1967).

At the very least, even if there is not malice as a matter of law, Petitioner must be given an opportunity to retry this cause at which retrial he can develop more fully the relationship between Respondent and Stang, the alleged free-lance author who is in reality an integral and managerial part of Respondent's organization. Such a connection, which was fraudulently concealed from

Petitioner and the Court below, will be sufficient to attribute his malice to Respondent, and thus make it answerable for his outrageous actions. Petitioner was informed that such information would be unnecessary at the trial of this case. Now that the rules of the game have been changed *ex post facto,* due process requires that Petitioner be given an opportunity to carry any burden under those rules.

Contrary to Respondent's contention, Petitioner does not seek that attorneys be given a special privilege. Rather, Petitioner contends that attorneys and their clients must not be penalized because they have undertaken to shoulder a public trust. When they are defamed, they must have a reasonable opportunity to set the record straight. When an attorney is involved in a trial, and the proceedings leading up to it, he is bound by the canons of ethics not to try his case in the newspapers. Now, Respondents would deny him recompense through the Courts as well. He must have some reasonable access to some forum wherein he may be vindicated. That is all Petitioner asks.

Moreover, it is grossly unfair for a court which has discretion in taxing costs to charge Petitioner in a situation in which he is admittedly blameless. At the very least, there should be no taxing of such costs, and certainly not in the amount involved herein.

CONCLUSION.

Contrary to Respondent's off-hand dismissal of this case, it does indeed present important issues which should be thoroughly explored by this Court. No similar situation has been considered by this Court in connection with the status of libel in light of the First Amendment.

The proceedings in this case have turned out to be somewhat bizarre. The case was tried on the express instructions that it was a traditional libel case, and that the language complained of was libelous *per se*. Thus, Petitioner was required to prove neither actual damages nor malice. After the jury had awarded him a verdict, the District Court held that he was in actuality a public figure, that he should have proved malice and that his purported failure to do so was fatal to his case. Having changed the applicable rules *ex post facto*, it would have been appropriate to grant a new trial in order that Petitioner could meet this newly created burden of proof. Yet, the District Court and the Court of Appeals denied Petitioner this obvious remedy. And, to add injury to insult as it were, the Court of Appeals ordered Petitioner to pay all of the very substantial costs of the case (over $2,000). A clearer denial of due process could hardly be imagined. (See pp. 48ff of original brief)

As demonstrated by Petitioner in his main brief, this case illustrates a collision of the fundamental constitutional rights of privacy and freedom of speech. Each of these rights is entitled to protection. Neither one is paramount to the other. In a society as complex as ours, the individual is in danger of being submerged. The rights

of the individual must not be suppressed at the expense of the "greater good." This is particularly true where an accommodation can be made which grants the individual and the public sufficient protection of their legitimate interests. Requiring one libelled to prove the falsity of the accusations and, after such a showing, requiring the publisher to prove his probably cause to believe the truth of his statements, grants sufficient protection to all in terms readily understood by the courts and the public. Neither side is saddled with an unconscionable burden. Both are thereby required to conform their conduct to acceptable standards. Such an approach will preserve that free, open and robust debate which is vital to the existence of our free society while at the same time granting the individual a reasonable opportunity to obtain vindication for unsupportable harms done to him.

There is nothing in *New York Times* v. *Sullivan*, and its progeny which permits deliberate lying and distortion. Respondent has the effrontery to declare in its brief that it did not call Petitioner a Communist. Does it think that the justices of this Court cannot read?

For the foregoing reasons, the judgment of the Court of Appeals, affirming the judgment of the District Court, must be reversed and the verdict in petitioner's favor reinstated. Alternatively, the judgments below must be reversed with directions to order a new trial in conformity with the standards specified by this Court. In any events, no costs should be taxed against Petitioner.

Respectfully submitted,

WAYNE B. GIAMPIETRO

Attorney for Petitioner

(Slip Opinion)

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Lumber Co.*, 200 U.S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

GERTZ *v.* ROBERT WELCH, Inc.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 72–617. Argued November 14, 1973—Decided June 25, 1974

A Chicago policeman named Nuccio was convicted of murder. The victim's family retained petitioner, a reputable attorney, to represent them in civil litigation against Nuccio. An article appearing in respondent's magazine alleged that Nuccio's murder trial was part of a Communist conspiracy to discredit the local police, and it falsely stated that petitioner had arranged Nuccio's "frame-up," implied that petitioner had a criminal record, and labeled him a "Communist-fronter." Petitioner brought this diversity libel action against respondent. After the jury returned a verdict for petitioner, the District Court decided that the standard enunciated in *New York Times Co.* v. *Sullivan*, 376 U. S. 254, which bars media liability for defamation of a public official absent proof that the defamatory statements were published with knowledge of their falsity or in reckless disregard of the truth, should apply to this suit. The court concluded that that standard protects media discussion of a public issue without regard to whether the person defamed is a public official as in *New York Times Co.* v. *Sullivan*, *supra*, or a public figure, as in *Curtis Publishing Co.* v. *Butts*, 388 U. S. 130. The court found that petitioner had failed to prove knowledge of falsity or reckless disregard for the truth and therefore entered judgment *n. o. v.* for respondent. The Court of Appeals affirmed. *Held:*

1. A publisher or broadcaster of defamatory falsehoods about an individual who is neither a public official nor a public figure may not claim the *New York Times* protection against liability for defamation on the ground that the defamatory statements concern an issue of public or general interest. Pp. 15–24.

(a) Because private individuals characteristically have less effective opportunities for rebuttal than do public officials and

public figures, they are more vulnerable to injury from defamation. Because they have not voluntarily exposed themselves to increased risk of injury from defamatory falsehoods, they are also more deserving of recovery. The state interest in compensating injury to the reputation of private individuals is therefore greater than for public officials and public figures. Pp. 19–21.

(b) To extend the *New York Times* standard to media defamation of private persons whenever an issue of general or public interest is involved would abridge to an unacceptable degree the legitimate state interest in compensating private individuals for injury to reputation and would occasion the additional difficulty of forcing courts to decide on an *ad hoc* basis which publications and broadcasts address issues of general or public interest and which do not. Pp. 21–22.

(c) So long as they do not impose liability without fault, the States may define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood which injures a private individual and whose substance makes substantial danger to reputation apparent. Pp. 22–24.

2. The States, however, may not permit recovery of presumed or punitive damages when liability is not based on knowledge of falsity or reckless disregard for the truth, and the private defamation plaintiff who establishes liability under a less demanding standard than the *New York Times* test may recover compensation only for actual injury. Pp. 24–26.

3. Petitioner was neither a public official nor a public figure. Pp. 26–28.

(a) Neither petitioner's past service on certain city committees nor his appearance as an attorney at the coroner's inquest into the death of the murder victim made him a public official. Pp. 26–27.

(b) Petitioner was also not a public figure. Absent clear evidence of general fame or notoriety in the community and pervasive involvement in ordering the affairs of society, an individual should not be deemed a public figure for all aspects of his life. Rather, the public figure question should be determined by reference to the individual's participation in the particular controversy giving rise to the defamation. Petitioner's role in the Nuccio affair did not make him a public figure. Pp. 27–28.

471 F. 2d 801, reversed and remanded.

Syllabus

POWELL, J., delivered the opinion of the Court, in which STEWART, MARSHALL, BLACKMUN, and REHNQUIST, JJ., joined. BLACKMUN, J., filed a concurring opinion. BURGER, C. J., and DOUGLAS, BRENNAN, and WHITE, JJ., filed dissenting opinions.

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D.C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 72–617

Elmer Gertz, Petitioner, *v.* Robert Welch, Inc. | On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

[June 25, 1974]

MR. JUSTICE POWELL delivered the opinion of the Court.

This Court has struggled for nearly a decade to define the proper accommodation between the law of defamation and the freedoms of speech and press protected by the First Amendment. With this decision we return to that effort. We granted certiorari to reconsider the extent of a publisher's constitutional privilege against liability for defamation of a private citizen. 410 U. S. 925 (1973).

I

In 1968 a Chicago policeman named Nuccio shot and killed a youth named Nelson. The state authorities prosecuted Nuccio for the homicide and ultimately obtained a conviction for murder in the second degree. The Nelson family retained petitioner Elmer Gertz, a reputable attorney, to represent them in civil litigation against Nuccio.

Respondent publishes American Opinion, a monthly outlet for the views of the John Birch Society. Early in the 1960's the magazine began to warn of a nationwide conspiracy to discredit local law enforcement agencies and create in their stead a national police force capable of supporting a communist dictatorship. As part of the

continuing effort to alert the public to this assumed danger, the managing editor of American Opinion commissioned an article on the murder trial of officer Nuccio. For this purpose he engaged a regular contributor to the magazine. In March of 1969 respondent published the resulting article under the title "FRAME-UP: Richard Nuccio And The War On Police." The article purports to demonstrate that the testimony against Nuccio at his criminal trial was false and that his prosecution was part of the communist campaign against the police.

In his capacity as counsel for the Nelson family in the civil litigation, petitioner attended the coroner's inquest into the boy's death and initiated actions for damages, but he neither discussed officer Nuccio with the press nor played any part in the criminal proceeding. Notwithstanding petitioner's remote connection with the prosecution of Nuccio, respondent's magazine portrayed him as an architect of the "frame-up." According to the article, the police file on petitioner took "a big, Irish cop to lift." The article stated that petitioner had been an official of the "Marxist League for Industrial Democracy, originally known as the Intercollegiate Socialist Society, which has advocated the violent seizure of our government." It labelled Gertz a "Leninist" and a "Communist-fronter." It also stated that Gertz had been an officer of the National Lawyers Guild, described as a communist organization that "probably did more than any other outfit to plan the Communist attack on the Chicago police during the 1968 Democratic convention."

These statements contained serious inaccuracies. The implication that petitioner had a criminal record was false. Petitioner had been a member and officer of the National Lawyers Guild some 15 years earlier, but there was no evidence that he or that organization had taken any part in planning the 1968 demonstrations in Chicago.

There was also no basis for the charge that petitioner was a "Leninist" or a "Communist-fronter." And he had never been a member of the "Marxist League for Industrial Democracy" or the "Intercollegiate Socialist Society."

The managing editor of American Opinion made no effort to verify or substantiate the charges against petitioner. Instead, he appended an editorial introduction stating that the author had "concluded extensive research into the Richard Nuccio case." And he included in the article a photograph of petitioner and wrote the caption that appeared under it: "Elmer Gertz of the Red Guild harrasses Nuccio." Respondent placed the issue of American Opinion containing the article on sale at newsstands throughout the country and distributed reprints of the article on the streets of Chicago.

Petitioner filed a diversity action for libel in the United States District Court for the Northern District of Illinois. He claimed that the falsehoods published by respondent injured his reputation as a lawyer and a citizen. Before filing an answer, respondent moved to dismiss the complaint for failure to state a claim upon which relief could be granted, apparently on the ground that petitioner failed to allege special damages. But the court ruled that statements contained in the article constituted libel *per se* under Illinois law and that consequently petitioner need not plead special damages. 306 F. Supp. 310 (ND Ill. 1969).

After answering the complaint, respondent filed a pretrial motion for summary judgment, claiming a constitutional privilege against liability for defamation.[1] It asserted that petitioner was a public official or a public

[1] Petitioner filed a cross-motion for summary judgment on grounds not specified in the record. The Court denied petitioner's cross-motion without discussion in a memorandum opinion of Sept. 16, 1970.

figure and that the article concerned an issue of public interest and concern. For these reasons, respondent argued, it was entitled to invoke the privilege enunciated in *New York Times Co.* v. *Sullivan*, 376 U. S. 254 (1964). Under this rule respondent would escape liability unless petitioner could prove publication of defamatory falsehood "with 'actual malice'—that is, in the knowledge that it was false or with reckless disregard for whether it was true or not." *Id.*, at 279–280. Respondent claimed that petitioner could not make such a showing and submitted a supporting affidavit by the magazine's managing editor. The editor denied any knowledge of the falsity of the statements concerning petitioner and stated that he had relied on the author's reputation and on his prior experience with the accuracy and authenticity of his contributions to American Opinion.

The District Court denied respondent's motion for summary judgment in a memorandum opinion of Sept. 16, 1970. The court did not dispute respondent's claim to the protection of the *New York Times* standard. Rather, it concluded that petitioner might overcome the constitutional privilege by making a factual showing sufficient to prove publication of defamatory falsehood in reckless disregard of the truth. During the course of the trial, however, it became clear that the trial court had not accepted all of respondent's asserted grounds for applying the *New York Times* rule to this case. It thought that respondent's claim to the protection of the constitutional privilege depended on the contention that petitioner was either a public official under the *New York Times* decision or a public figure under *Curtis Publishing Co.* v. *Butts*, 388 U. S. 130 (1967), apparently discounting the argument that a privilege would arise from the presence of a public issue. After all the evidence had been presented but before submission of the case to the jury, the court ruled in effect that petitioner was neither a public

official nor a public figure. It added that, if he were, the resulting application of the *New York Times* standard would require a directed verdict for respondent. Because some statements in the article constituted libel *per se* under Illinois law, the court submitted the case to the jury under instructions that withdrew from its consideration all issues save the measure of damages. The jury awarded $50,000 to petitioner.

Following the jury verdict and on further reflection, the District Court concluded that the *New York Times* standard should govern this case even though petitioner was not a public official or public figure. It accepted respondent's contention that that privilege protected discussion of any public issue without regard to the status of a person defamed therein. Accordingly, the court entered judgment for respondent notwithstanding the jury's verdict.[2] This conclusion anticipated the reason-

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[2] 322 F. Supp. 997 (ND Ill., Dec. 8, 1970). Petitioner asserts that the entry of judgment *n. o. v.* on the basis of his failure to show knowledge of falsity or reckless disregard for the truth constituted unfair surprise and deprived him of a full and fair opportunity to prove "actual malice" on the part of respondents. This contention is not supported by the record. It is clear that the trial court gave petitioner no reason to assume that the *New York Times* privilege would not be available to respondent. The court's memorandum opinion denying respondent's pretrial motion for summary judgment does not state that the *New York Times* standard was inapplicable to this case. Rather, it reveals that the trial judge thought it possible for petitioner to make a factual showing sufficient to overcome respondent's claim of constitutional privilege. It states in part:

"When there is a factual dispute as to the existence of actual malice, summary judgment is improper.

. . . . . .

"In the instant case a jury might infer from the evidence that [respondent's] failure to investigate the truth of the allegations, coupled with its receipt of communications challenging the factual accuracy of this author in the past amounted to actual malice, that

ing of a plurality of this Court in *Rosenbloom* v. *Metromedia*, 403 U. S. 29 (1971).

Petitioner appealed to contest the applicability of the *New York Times* standard to this case. Although the Court of Appeals for the Seventh Circuit doubted the correctness of the District Court's determination that petitioner was not a public figure, it did not overturn that finding.[3] It agreed with the District Court that respondent could assert the constitutional privilege because the article concerned a matter of public interest, citing this Court's intervening decision in *Rosenbloom* v. *Metromedia, Inc., supra*. The Court of Appeals read *Rosenbloom* to require application of the *New York*

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is, 'reckless disregard' of whether the allegations were true or not. *New York Times* [*Co.*] v. *Sullivan, supra*, at 279–280." Mem. Op., Sept. 16, 1970.

Thus, petitioner knew or should have known that the outcome of the trial might hinge on his ability to show by clear and convincing evidence that respondent acted with reckless disregard for the truth. And this question remained open throughout the trial. Although the court initially concluded that the applicability of *New York Times* rule depended on petitioner's status as a public figure, the court did not decide that petitioner was not a public figure until all the evidence had been presented. Thus petitioner had every opportunity, indeed incentive, to prove "reckless disregard" if he could, and he in fact attempted to do so. The record supports the observation by the Court of Appeals that petitioner "did present evidence of malice (both the 'constitutional' and the 'ill-will' type) to support his damage claim and no such evidence was excluded. . . ." 471 F. 2d 801, at 807, n. 15.

[3] The court stated:

"[Petitioner's] considerable stature as a lawyer, author, lecturer, and participant in matters of public import undermine the validity of the assumption that he is not a 'public figure' as that term has been used by the progeny of *New York Times*. Nevertheless, for purposes of decision we make that assumption and test the availability of the claim of privilege by the subject matter of the article." 471 F. 2d, at 805.

Times standard to any publication or broadcast about an issue of significant public interest, without regard to the position, fame, or anonymity of the person defamed, and it concluded that respondent's statements concerned such an issue.[4] After reviewing the record,

[4] In the Court of Appeals petitioner made an ingenious but unavailing attempt to show that respondent's defamatory charge against him concerned no issue of public or general interest. He asserted that the subject matter of the article was the murder trial of Officer Nuccio and that he did not participate in that proceeding. Therefore, he argued, even if the subject matter of the article generally were protected by the *New York Times* privilege, under the opinion of the *Rosenbloom* plurality, the defamatory statements about him were not. The Court of Appeals rejected this argument. It noted that the accusations against petitioner played an integral part in respondent's general thesis of a nationwide conspiracy to harass the police:

"[W]e may also assume that the article's basic thesis is false. Nevertheless, under the reasons of *New York Times* v. *Sullivan*, even a false statement made in support of a false thesis is protected unless made with knowledge of its falsity or with reckless disregard of its truth or falsity. It would undermine the rule of that case to permit the actual falsity of a statement to determine whether or not its publisher is entitled to the benefit of the rule.

"If, therefore, we put to one side the false character of the article and treat it as though its contents were entirely true, it cannot be denied that the comments about [petitioner] were integral to its thesis. They must be tested under the *New York Times* standard." 471 F. 2d, at 806.

We think that the Court of Appeals correctly rejected petitioner's argument. Its acceptance might lead to arbitrary imposition of liability on the basis of an unwise differentiation among kinds of factual misstatements. The present case illustrates the point. Respondent falsely portrayed petitioner as an architect of the criminal prosecution against Nuccio. On its face this inaccuracy does not appear defamatory. Respondent also falsely labelled petitioner a "Leninst" and a "Communist-fronter." These accusations are generally considered defamatory. Under petitioner's interpretation of the "public or general interest" test, respondent would have enjoyed a constitutional privilege to publish defamatory falsehoods if

the Court of Appeals endorsed the District Court's conclusion that petitioner had failed to show by clear and convincing evidence that respondent had acted with "actual malice" as defined by *New York Times*. There was no evidence that the managing editor of American Opinion knew of the falsity of the accusations made in the article. In fact, he knew nothing about petitioner except what he learned from the article. The court correctly noted that mere proof of failure to investigate, without more, cannot establish reckless disregard for the truth. Rather, the publisher must act with a "high degree of awareness . . . of probable falsity." *St. Amant* v. *Thompson*, 390 U. S. 727, 731 (1968). Accord: *Beckley Newspaper Corp.* v. *Hanks*, 389 U. S. 81, 84–85 (1967); *Garrison* v. *Louisiana*, 379 U. S. 67, 75–76 (1964). The evidence in this case did not reveal that respondent had cause for such an awareness. The Court of Appeals therefore affirmed 471 F. 2d 801 (1972). For the reasons stated below, we reverse.

II

The principal issue in this case is whether a newspaper or broadcaster that publishes defamatory falsehoods about an individual who is neither a public official nor a public figure may claim a constitutional privilege against liability for the injury in-

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petitioner had in fact been associated with the criminal prosecution. But this would mean that the seemingly innocuous mistake of confusing petitioner's role in the litigation against officer Nuccio would destroy the privilege otherwise available for calling petitioner a communist-fronter. Thus respondent's privilege to publish statements whose content should have alerted it to the danger of injury to reputation would hinge on the accuracy of statements that carried with them no such warning. Assuming that none of these statements was published with knowledge of falsity or with reckless disregard for the truth, we see no reason to distinguish among the inaccuracies.

flicted by those statements. The Court considered this question on the rather different set of facts presented in *Rosenbloom* v. *Metromedia, Inc.*, 403 U. S. 29 (1971). Rosenbloom, a distributor of nudist magazines, was arrested for selling allegedly obscene material while making a delivery to a retail dealer. The police obtained a warrant and seized his entire inventory of 3,000 books and magazine. He sought and obtained an injunction prohibiting further police interference with his business. He then sued a local radio station for failing to note in two of its newscasts that the 3,000 items seized were only "reportedly" or "allegedly" obscene and for broadcasting references to "the smut literature racket" and to "girlie-book peddlers" in its coverage of the court proceeding for injunctive relief. He obtained a judgment against the radio station, but the Court of Appeals for the Third Circuit held the *New York Times* privilege applicable to the broadcast and reversed. 415 F. 2d 892 (1969).

This Court affirmed the decision below, but no majority could agree on a controlling rationale. The eight Justices[5] who participated in *Rosenbloom* announced their views in five separate opinions, none of which commanded more than three votes. The several statements not only reveal disagreement about the appropriate result in that case; they also reflect divergent traditions of thought about the general problem of reconciling the law of defamation with the First Amendment. One approach has been to extend the *New York Times* test to an expanding variety of situations. Another has been to vary the level of constitutional privilege for defamatory falsehood with the status of the person defamed. And a third view would grant to the press and broadcast media absolute immunity from liability for defamation. To place our holding in the proper context, we preface our discus-

[5] MR. JUSTICE DOUGLAS did not partcipate in the consideration or decision of *Rosenbloom*.

sion of this case with a review of the several *Rosenbloom* opinions and their antecedents.

In affirming the trial court's judgment in the instant case, the Court of Appeals relied on MR. JUSTICE BRENNAN's conclusion for the *Rosenbloom* plurality that "all discussion and communication involving matters of public or general concern" warrant the protection from liability for defamation accorded by the rule originally enunciated in *New York Times Co.* v. *Sullivan*, 376 U. S. 254 (1964). There this Court defined a constitutional privilege intended to free criticism of public officials from the restraints imposed by the common law of defamation. The Times ran a political advertisement endorsing civil rights demonstrations by black students in Alabama and impliedly condemning the performance of local law enforcement officials. A police commissioner established in state court that certain misstatements in the advertisement referred to him and that they constituted libel *per se* under Alabama law. This showing left the Times with the single defense of truth, for under Alabama law neither good faith nor reasonable care would protect the newspaper from liability. This Court concluded that a "rule compelling the critic of official conduct to guarantee the truth of all his factual assertions" would deter protected speech, *id.*, at 279, and announced the constitutional privilege designed to counter that effect:

> "The constitutional guarantees require, we think, a federal rule that prohibits a public official from recovery of damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice'—that is, in the knowledge that it was false or with reckless disregard of whether it was true or not." *Id.*, at 279–280.[6]

[6] *New York Times* and later cases explicated the meaning of the

Three years after *New York Times*, a majority of the Court agreed to extend the constitutional privilege to defamatory criticism of "public figures." This extension

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new standard. In *New York Times* the Court held that under the circumstances the newspaper's failure to check the accuracy of the advertisement against news stories in its own files did not establish reckless diregard for the truth. 376 U. S., at 287–288. In *St. Amant* v. *Thompson*, 390 U. S. 727, 731 (1968), the Court equated reckless disregard of the truth with subjective awareness of probable falsity: "There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication." In *Beckley Newspapers Corp.* v. *Hanks*, 389 U. S. 81 (1967), the Court emphasized the distinction between the *New York Times* test of knowledge of falsity or reckless disregard of the truth and "actual malice" in the traditional sense of ill-will. *Garrison* v. *Louisiana*, 379 U. S. 64 (1964), made plain that the new standard applied to criminal libel laws as well as to civil actions and that it governed criticism directed at "anything which might touch on an official's fitness for office." *Id.*, at 77. Finally, in *Rosenblatt* v. *Baer*, 383 U. S. 75, 85 (1966), the Court stated that "the 'public official' designation applies at the very least to those among the hierarchy of government employees who have, or appear to the public to have, substantial responsibility for or control over the conduct of government affairs."

In *Time, Inc.* v. *Hill*, 385 U. S. 374 (1967), the Court applied the *New York Times* standard to actions under an unusual state statute. The statute did not create a cause of action for libel. Rather, it provided a remedy for unwanted publicity. Although the law allowed recovery of damages for harm caused by exposure to public attention rather than by factual inaccuracies, it recognized truth as a complete defense. Thus, nondefamatory factual errors could render a publisher liable for something akin to invasion of privacy. The Court ruled that the defendant in such an action could invoke the *New York Times* privilege regardless of the fame or anonymity of the plaintiff. Speaking for the Court, MR. JUSTICE BRENNAN declared that this holding was not an extension of *New York Times* but rather a parallel line of reasoning applying that standard to this discrete context:

"This is neither a libel action by a private individual nor a statutory action by a public official. Therefore, although the First Amendment principles announced in *New York Times* guide our conclusion, we reach that conclusion only by applying these principles

was announced in *Curtis Publishing Co.* v. *Butts* and its companion *Associated Press* v. *Walker*, 388 U. S. 130, 162 (1967). The first case involved the Saturday Evening Post's charge that Coach Wally Butts of the University of Georgia had conspired with Coach Bear Bryant of the University of Alabama to fix a football game between their respective schools. *Walker* involved an erroneous Associated Press account of Brigadier General Edwin Walker's participation in a University of Mississippi campus riot. Because Butts was paid by a private alumni association and Walker had retired from the Army, neither could be classified as a "public official" under *New York Times*. Although Mr. Justice Harlan announced the result in both cases, a majority of the Court agreed with Mr. Chief Justice Warren's conclusion that the *New York Times* test should apply to criticism of "public figures" as well as "public officials." [7] The Court extended the con-

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in this discrete context. It therefore serves no purpose to distinguish the facts here from those in *New York Times*. Were this a libel action, the distinction which has been suggested between the relative opportunities of the public official and the private individual to rebut defamatory charges might be germane. And the additional state interest in the protection of the individual against damages to his reputation would be involved. Cf. *Rosenblatt* v. *Baer*, 383 U. S. 75, 91 (STEWART, J., concurring)." *Id.*, at 390–391.

[7] Professor Kalven once introduced a discussion of these cases with the apt heading, "You Can't Tell the Players Without a Score Card." H. Kalven, The Reasonable Man and the First Amendment, 1967 Sup. Ct. Rev. 267, 275 (1967). Only three other Justices joined Mr. Justice Harlan's analysis of the issues involved. In his concurring opinion, Mr. Chief Justice Warren stated the principle for which these cases stand—that the *New York Times* test reaches both public figures and public officials. MR. JUSTICE BRENNAN and MR. JUSTICE WHITE agreed with the Chief Justice on that question. Mr. Justice Black and MR JUSTICE DOUGLAS reiterated their view that publishers should have an absolute immunity from liability for defamation, but they acquiesed in the Chief Justice's reasoning in order to enable a majority of the Justices to agree on the question

stitutional privilege announced in that case to protect defamatory criticism of nonpublic officials who "are nevertheless intimately involved in the resolution of important public questions, or, by reason of their fame, shape events in areas of concern to society at large." *Id.*, at 164.

In his opinion for the plurality in *Rosenbloom* v. *Metromedia, Inc.*, 403 U. S. 29 (1971), MR. JUSTICE BRENNAN took the *New York Times* privilege one step further. He concluded that its protection should extend to defamatory falsehoods relating to private persons if the statements concerned matters of general or public interest. He abjured the suggested distinction between public officials and public figures on the one hand and private individuals on the other. He focused instead on society's interest in learning about certain issues: "If a matter is a subject of public or general interest, it cannot suddenly become less so merely because a private individual is involved or because in some sense the individual did not choose to become involved." 403 U. S., at 43. Thus, under the plurality opinion, a private citizen involuntarily associated with a matter of general interest has no recourse for injury to his reputation unless he can satisfy the demanding requirements of the *New York Times* test.

Two members of the Court concurred in the result in *Rosenbloom* but departed from the reasoning of the plurality. Mr. Justice Black restated his view, long shared by MR. JUSTICE DOUGLAS, that the First Amendment cloaks the news media with an absolute and indefeasible immunity from liability for defamation. *Id.*, at 57. MR JUSTICE WHITE concurred on a narrower ground. *Ibid.* He concluded that "the First Amendment gives the press and the broadcast media a privilege to report and comment upon the official actions of public

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of the appropriate constitutional privilege for defamation of public figures.

servants in full detail, with no requirement that the reputation or privacy of an individual involved in or affected by the official action be spared from public view." *Id.*, at 62. He therefore declined to reach the broader questions addressed by the other Justices.

Mr. Justice Harlan dissented. Although he had joined the opinion of the Court in *New York Times*, in *Curtis Publishing Co.* he had contested the extension of the privilege to public figures. There he had argued that a public figure who held no governmental office should be allowed to recover damages for defamation "on a showing of highly unreasonable conduct constituting an extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers." 388 U. S., at 155. In his *Curtis Publishing Co.* opinion Mr. Justice Harlan had distinguished *New York Times* primarily on the ground that defamation actions by public officials "lay close to seditious libel. . . . " *Id.*, at 133. Recovery of damages by one who held no public office, however, could not "be viewed as a vindication of governmental policy." *Id.*, at 154. Additionally, he had intimated that, because most public officials enjoyed absolute immunity from liability for their own defamatory utterances under *Barr v. Matteo*, 360 U. S. 564 (1959), they lacked a strong claim to the protection of the courts.

In *Rosenbloom* Mr. Justice Harlan modified these views. He acquiesced in the application of the privilege to defamation of public figures but argued that a different rule should obtain where defamatory falsehood harmed a private individual. He noted that a private person has less likelihood "of securing access to the channels of communication sufficient to rebut falsehoods concerning him" than do public officials and public figures, *id.*, at 70, and has not voluntarily placed himself in the public

spotlight. Mr. Justice Harlan concluded that the States could constitutionally allow private individuals to recover damages for defamation on the basis of any standard of care except liability without fault.

MR. JUSTICE MARSHALL dissented in *Rosenbloom* in an opinion joined by MR. JUSTICE STEWART. *Id.*, at 78. He thought that the plurality's "public or general interest" test for determining the applicability of the *New York Times* privilege would involve the courts in the dangerous business of deciding "what information is relevant to self-government." *Id.*, at 79. He also contended that the plurality's position inadequately served "society's interest in protecting private individuals from being thrust into the public eye by the distorting light of defamation." *Ibid.* MR. JUSTICE MARSHALL therefore reached the conclusion, also reached by Mr. Justice Harlan, that the States should be "essentially free to continue the evaluation of the common law of defamation and to articulate whatever fault standards best suits the State's need," so long as the States did not impose liability without fault. *Id.*, at 86. The principal point of disagreement among the three dissenters concerned punitive charges. Whereas Mr. Justice Harlan thought that the States could allow punitive damages in amounts bearing "a reasonable and purposeful relationship to the actual harm done . . . ," *id.*, at 75, MR. JUSTICE MARSHALL concluded that the size and unpredictability of jury awards of exemplary damages unnecessarily exacerbated the problems of media self-censorship and that such damages should therefore be forbidden.

III

We begin with the common ground. Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but

on the competition of other ideas.[8] But there is no constitutional value in false statements of fact. Neither the intentional lie nor the careless error materially advances society's interest in "uninhibited, robust, and wide-open" debate on public issues. *New York Times Co.* v. *Sullivan*, 376 U. S., at 270. They belong to that category of utterances which "are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality." *Chaplinsky* v. *New Hampshire*, 315 U. S. 568, 572 (1942).

Although the erroneous statement of fact is not worthy of constitutional protection, it is nevertheless inevitable in free debate. As James Madison pointed out in the Report on the Virginia Resolutions of 1798, "Some degree of abuse is inseparable from the proper use of everything; and in no instance is this more true than that of the press." 4 Elliot's Debates (1876), p. 571. And punishment of error runs the risk of inducing a cautious and restrictive exercise of the constitutionally guaranteed freedoms of speech and press. Our decisions recognize that a rule of strict liability that compels a publisher or broadcaster to guarantee the accuracy of his factual assertions may lead to intolerable self-censorship. Allowing the media to avoid liability only by proving the truth of all injurious statements does not accord adequate protection to First Amendment liberties. As the Court stated in *New York Times Co.* v. *Sullivan, supra*, 376 U. S., at 279, "Allowance of the defense of truth, with the burden of proving it on the defendant, does not mean

[8] As Thomas Jefferson made the point in his first Inaugural Address: "If there be any among us who wish to dissolve this union or change its republican form of government, let them stand undisturbed as monuments of the safety with which error of opinion may be tolerated where reason is left free to combat it."

that only false speech will be deterred." The First Amendment requires that we protect some falsehood in order to protect speech that matters.

The need to avoid self-censorship by the news media is, however, not the only societal value at issue. If it were, this Court would have embraced long ago the view that publishers and broadcasters enjoy an unconditional and indefeasible immunity from liability for defamation. See *New York Times Co.* v. *Sullivan*, 376 U. S. 254, 293 (1964) (opinion of Black, J.); *Garrison* v. *Louisiana*, 379 U. S. 64, 80 (1964) (opinion of DOUGLAS, J.); *Curtis Publishing Co.* v. *Butts*, 388 U. S. 130, 170 (1967) (opinion of Black, J.). Such a rule would indeed obviate the fear that the prospect of civil liability for injurious falsehood might dissuade a timorous press from the effective exercise of First Amendment freedoms. Yet absolute protection for the communications media requires a total sacrifice of the competing value served by the law of defamation.

The legitimate state interest underlying the law of libel is the compensation of individuals for the harm inflicted on them by defamatory falsehoods. We would not lightly require the State to abandon this purpose, for, as MR. JUSTICE STEWART has reminded us, the individual's right to the protection of his own good name

> "reflects no more than our basic concept of the essential dignity and worth of every human being—a concept at the root of any decent system of ordered liberty. The protection of private personality, like the protection of life itself, is left primarily to the individual states under the Ninth and Tenth Amendments. But this does not mean that the right is entitled to any less recognition by this Court as a basic of our constitutional system." *Rosenblatt* v. *Baer*, 383 U. S. 75, 92–93 (1963) (opinion of STEWART, J.).

Some tension necessarily exists between the need for a vigorous and uninhibited press and the legitimate interest in redressing wrongful injury. As Mr. Justice Harlan stated, "some antithesis between freedom of speech and press and libel actions persists, for libel remains premised on the content of speech and limits the freedom of the publisher to express certain sentiments, at least without guaranteeing legal proof of their substantial accuracy." *Curtis Publishing Co.* v. *Butts*, 388 U. S., at 152. In our continuing effort to define the proper accommodation between these competing concerns, we have been especially anxious to assure to the freedoms of speech and press that "breathing space" essential to their fruitful exercise. *NAACP* v. *Button*, 371 U. S. 415, 433 (1963). To that end this Court has extended a measure of strategic protection to defamatory falsehood.

The *New York Times* standard defines the level of constitutional protection appropriate to the context of defamation of a public person. Those who, by reason of the notoriety of their achievements or the vigor and success with which they seek the public's attention, are properly classed as public figures and those who hold governmental office may recover for injury to reputation only on clear and convincing proof that the defamatory falsehood was made with knowledge of its falsity or with reckless disregard for the truth. This standard administers an extremely powerful antidote to the inducement to media self-censorship of the common law rule of strict liability for libel and slander. And it exacts a correspondingly high price from the victims of defamatory falsehood. Plainly many deserving plaintiffs, including some intentionally subjected to injury, will be unable to surmount the barrier of the *New York Times* test. Despite this substantial abridgement of the state law right to com-

pensation for wrongful hurt to one's reputation, the Court has concluded that the protection of the *New York Times* privilege should be available to publishers and broadcasters of defamtory falsehoods concerning public officials and public figures. *New York Times Co.* v. *Sullivan*, 376 U. S. 254 (1964); *Curtis Publishing Co.* v. *Butts*, 388 U. S. 130 (1967). We think that these decisions are correct, but we do not find their holdings justified solely by reference to the interest of the press and broadcast media in immunity from liability. Rather, we believe that the *New York Times* rule states an accommodation between this concern and the limited state interest present in the context of libel actions brought by public persons. For the reasons stated below, we conclude that the state interest in compensating injury to the reputation of private individuals requires that a different rule should obtain with respect to them.

Theoretically, of course, the balance between the needs of the press and the individual's claim to compensation for wrongful injury might be struck on a case-by-case basis. As Mr. Justice Harlan hypothesized, "it might seem, purely as an abstract matter, that the most utilitarian approach would be to scrutinize carefully every jury verdict in every libel case, in order to ascertain whether the final judgment leaves fully protected whatever First Amendment values transcend the legitimate state interest in protecting the particular plaintiff who prevailed." *Rosenbloom* v. *Metromedia, Inc.*, 403 U. S. 29, 63 (1971) (footnote omitted). But this approach would lead to unpredictable results and uncertain expectations, and it could render our duty to supervise the lower courts unmanageable. Because an *ad hoc* resolution of the competing interests at stake in each particular case is not feasible, we must lay down broad rules of general application. Such rules necessarily treat alike various

cases involving differences as well as similarities. Thus it is often true that not all of the considerations which justify adoption of a given rule will obtain in each particular case decided under its authority.

With that caveat we have no difficulty in distinguishing among defamation plaintiffs. The first remedy of any victim of defamation is self-help—using available opportunities to contradict the lie or correct the error and thereby to minimize its adverse impact on reputation. Public officials and public figures usually enjoy significantly greater access to the channels of effective communication and hence have a more realistic opportunity to counteract false statements than private individuals normally enjoy.[9] Private individuals are therefore more vulnerable to injury, and the state interest in protecting them is correspondingly greater.

More important than the likelihood that private individuals will lack effective opportunities for rebuttal, there is a compelling normative consideration underlying the distinction between public and private defamation plaintiffs. An individual who decides to seek governmental office must accept certain necessary consequences of that involvement in public affairs. He runs the risk of closer public scrutiny than might otherwise be the case. And society's interest in the officers of government is not strictly limited to the formal discharge of official duties. As the Court pointed out in *Garrison* v. *Louisiana*, 379 U. S. 64, 77 (1964), the public's interest extends to "anything that might touch on an official's fitness for office .... Few personal attributes are more germane to fitness for

[9] Of course, an opportunity for rebuttal seldom suffices to undo harm of defamatory falsehood. Indeed, the law of defamation is rooted in our experience that the truth rarely catches up with a lie. But the fact that the self-help remedy of rebuttal, standing alone, is inadequate to its task does not mean that it is irrelevant to our inquiry.

office than dishonesty, malfeasance, or improper motivation, even though these characteristics may also affect the official's private character."

Those classed as public figures stand in a similar position. Hypothetically, it may be possible for someone to become a public figure through no purposeful action of his own, but the instances of truly involuntary public figures must be exceedingly rare. For the most part those who attain this status have assumed roles of especial prominence in the affairs of society. Some occupy positions of such persuasive power and influence that they are deemed public figures for all purposes. More commonly, those classed as public figures have thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved. In either event, they invite attention and comment.

Even if the foregoing generalities do not obtain in every instance, the communications media are entitled to act on the assumption that public officials and public figures have voluntarily exposed themselves to increased risk of injury from defamatory falsehoods concerning them. No such assumption is justified with respect to a private individual. He has not accepted public office nor assumed an "influential role in ordering society." *Curtis Publishing Co.* v. *Butts, supra,* 388 U. S., at 164 (opinion of Warren, C. J.). He has relinquished no part of his interest in the protection of his own good name, and consequently he has a more compelling call on the courts for redress of injury inflicted by defamatory falsehood. Thus, private individuals are not only more vulnerable to injury than public officials and public figures; they are also more deserving of recovery.

For these reasons we conclude that the States should retain substantial latitude in their efforts to enforce a legal remedy for defamatory falsehood injurious to the reputation of a private individual. The extension of the

New York Times test proposed by the *Rosenbloom* plurality would abridge this legitimate state interest to a degree that we find unacceptable. And it would occasion the additional difficulty of forcing state and federal judges to decide on an *ad hoc* basic which publications address issues of "general or public interest" and which do not—to determine, in the words of MR. JUSTICE MARSHALL, "what information is relevant to self-government." *Rosenbloom* v. *Metromedia, Inc.*, 403 U. S., at 79. We doubt the wisdom of committing this task to the conscience of judges. Nor does the Constitution require us to draw so thin a line between the drastic alternatives of the *New York Times* privilege and the common law of strict liability for defamatory error. The "public or general interest" test for determining the applicability of the *New York Times* standard to private defamation actions inadequately serves both of the competing values at stake. On the one hand, a private individual whose reputation is injured by defamatory falsehood that does concern an issue of public or general interest has no recourse unless he can meet the rigorous requirements of *New York Times*. This is true despite the factors that distinguish the state interest in compensating private individuals from the analogous interest involved in the context of public persons. On the other hand, a publisher or broadcaster of a defamatory error which a court deems unrelated to an issue of public or general interest may be held liable in damages even if it took every reasonable precaution to ensure the accuracy of its assertions. And liability may far exceed compensation for any actual injury to the plaintiff, for the jury may be permitted to presume damages without proof of loss and even to award punitive damages.

We hold that, so long as they do not impose liability without fault, the States may define for themselves the

appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injurious to a private individual.[10] This approach provides a more equitable boundary between the competing concerns involved here. It recognizes the strength of the legitimate state interest in compensating private individuals for wrongful injury to reputation, yet shields the press and broadcast media from the rigors of strict liability for defamation. At least this conclusion obtains where, as here, the substance of the defamatory statement "makes substan-

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[10] Our caveat against strict liability is the prime target of MR. JUSTICE WHITE's dissent. He would hold that a publisher or broadcaster may be required to prove the truth of a defamatory statement concerning a private individual and, failing such proof, that the publisher or broadcaster may be held liable for defamation even though he took every conceivable precaution to ensure the accuracy of the offending statement prior to its dissemination. *Post*, at — (slip op., at 20–24). In MR. JUSTICE WHITE's view, one who publishes a statement that later turns out to be inaccurate can never be "without fault" in any meaningful sense, for "[i]t is he who circulated a falsehood *that he was not required to publish*." *Id.*, at — (slip op., at 23) (emphasis added).

MR. JUSTICE WHITE characterizes *New York Times Co.* v. *Sullivan*, *supra*, as simply a case of seditious libel. *Post*, at — (slip op., at 18). But that rationale is certainly inapplicable to *Curtis Publishing Co.* v. *Butts*, *supra*, where MR. JUSTICE WHITE joined four other Members of the Court to extend the knowing-or-reckless-falsity standard to media defamation of persons identified as public figures but not connected with the Government. MR. JUSTICE WHITE now suggests that he would abide by that vote, *id.*, at — (slip op., at 30), but the full thrust of his dissent—as we read it—contradicts that suggestion. Finally, in *Rosenbloom* v. *Metromedia, Inc.*, *supra*, MR. JUSTICE WHITE voted to apply the *New York Times* privilege to media defamation of an individual who was neither a public official nor a public figure. His opinion states that the knowing-or-reckless-falsity standard should apply to media "comment upon the official actions of public servants," 403 U. S., at 62, including defamatory falsehoods about a person arrested by the police. If adopted by

tial danger to reputation apparent." [11] This phrase places in perspective the conclusion we announce today. Our inquiry would involve considerations somewhat different from those discussed above if a State purported to condition civil liability on a factual misstatement whose content did not warn a reasonably prudent editor or broadcaster of its defamatory potential. Cf. *Time, Inc.* v. *Hill*, 385 U. S. 374 (1967). Such a case is not now before us, and we intimate no view as to its proper resolution.

IV

Our accommodation of the competing values at stake in defamation suits by private individuals allows the States to impose liability on the publisher or broadcaster of defamatory falsehoods on a less demanding showing than that required by *New York Times*. This conclusion is not based on a belief that the considerations which prompted the adoption of the *New York Times* privilege for defamation of public officials and its extension to public figures are wholly inapplicable to the context of private individuals. Rather, we endorse this approach in recognition of the strong and legitimate state interest

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the Court, this conclusion would significantly extend the *New York Times* privilege.

MR. JUSTICE WHITE asserts that our decision today "trivializes and denigrates the interest in reputation," *Miami Herald Publishing Co.* v. *Tornillo*, — U. S. —, — (slip op., at 4) (WHITE, J., concurring), that it "scuttle[s] the libel laws of the States in . . . wholesale fashion" and renders ordinary citizens "powerless to protect themselves." *Post*, at — (slip op., at 2). In light of the progressive extension of the knowing-or-reckless-falsity requirement detailed in the preceding paragraph, one might have viewed today's decision allowing recovery under any standard save strict liability as a more generous accommodation of the state interest in comprehensive reputational injury to private individuals than the law presently affords.

[11] *Curtis Publishing Co.* v. *Butts*, 388 U. S. 130, 155 (1967).

in compensating private individuals for injury to reputation. But this countervailing state interest extends no further than compensation for actual injury. For the reasons stated below, we hold that the States may not permit recovery of presumed or punitive damages, at least when liability is not based on a showing of knowledge of falsity or reckless disregard for the truth.

The common law of defamation is an oddity of tort law, for it allows recovery of purportedly compensatory damages without evidence of actual loss. Under the traditional rules pertaining to actions for libel, the existence of injury is presumed from the fact of publication. Juries may award substantial sums as compensation for supposed damage to reputation without any proof that such harm actually occurred. The largely uncontrolled discretion of juries to award damages where there is no loss unnecessarily compounds the potential of any system of liability for defamatory falsehood to inhibit the vigorous exercise of First Amendment freedoms. Additionally, the doctrine of presumed damages invites juries to punish unpopular opinion rather than to compensate individuals for injury sustained by the publication of a false fact. More to the point, the States have no substantial interest in securing for plaintiffs such as this petitioner gratuitous awards of money damages far in excess of any actual injury.

We would not, of course, invalidate state law simply because we doubt its wisdom, but here we are attempting to reconcile state law with a competing interest grounded in the constitutional command of the First Amendment. It is therefore appropriate to require that state remedies for defamatory falsehood reach no farther than is necessary to protect the legitimate interest involved. It is necessary to restrict defamation plaintiffs who do not prove knowledge of falsity or reckless disregard for the truth to compensation for actual injury. We

need not define "actual injury," as trial courts have wide experience in framing appropriate jury instructions in tort action. Suffice it to say that actual injury is not limited to out-of-pocket loss. Indeed, the more customary types of actual harm inflicted by defamatory falsehood include impairment of reputation and standing in the community, personal humiliation, and mental anguish and suffering. Of course, juries must be limited by appropriate instructions, and all awards must be supported by competent evidence concerning the injury, although there need be no evidence which assigns an actual dollar value to the injury.

We also find no justification for allowing awards of punitive damages against publishers and broadcasters held liable under state-defined standards of liability for defamation. In most jurisdictions jury discretion over the amounts awarded is limited only by the gentle rule that they not be excessive. Consequently, juries assess punitive damages in wholly unpredictable amounts bearing no necessary relation to the actual harm caused. And they remain free to use their discretion selectively to punish expressions of unpopular views. Like the doctrine of presumed damages, jury discretion to award punitive damages unnecessarily exacerbates the danger of media self-censorship, but, unlike the former rule, punitive damages are wholly irrelevant to the state interest that justifies a negligence standard for private defamation actions. They are not compensation for injury. Instead, they are private fines levied by civil juries to punish reprehensible conduct and to deter its future occurrence. In short, the private defamation plaintiff who establishes liability under a less demanding standard than that stated by *New York Times* may recover only such damages as are sufficient to compensate him for actual injury.

V

Notwithstanding our refusal to extend the *New York Times* privilege to defamation of private individuals, respondent contends that we should affirm the judgment below on the ground that petitioner is either a public official or a public figure. There is little basis for the former assertion. Several years prior to the present incident, petitioner had served briefly on housing committees appointed by the mayor of Chicago, but at the time of publication he had never held any remunerative governmental position. Respondent admits this but argues that petitioner's appearance at the coroner's inquest rendered him a "de facto public official." Our cases recognize no such concept. Respondent's suggestion would sweep all lawyers under the *New York Times* rule as officers of the court and distort the plain meaning of the "public official" category beyond all recognition. We decline to follow it.

Respondent's characterization of petitioner as a public figure raises a different question. That designation may rest on either of two alternative bases. In some instances an individual may achieve such pervasive fame or notoriety that he becomes a public figure for all purposes and in all contexts. More commonly, an individual voluntary injects himself or is drawn into a particular public controversy and thereby becomes a public figure for a limited range of issues. In either case such persons assume special prominence in the resolution of public questions.

Petitioner has long been active in community and professional affairs. He has served as an officer of local civil groups and of various professional organizations, and he has published several books and articles on legal subjects. Although petitioner was consequently well-known in some circles, he had achieved no general fame

or notoriety in the community. None of the prospective jurors called at the trial had ever heard of petitioner prior to this litigation, and respondent offered no proof that this response was atypical of the local population. We would not lightly assume that a citizen's participation in community and professional affairs rendered him a public figure for all purposes. Absent clear evidence of general fame or notoriety in the community, and pervasive involvement in the affairs of society, an individual should not be deemed a public personality for all aspects of his life. It is preferable to reduce the public figure question to a more meaningful context by looking to the nature and extent of an individual's participation in the particular controversy giving rise to the defamation.

In this context it is plain that petitioner was not a public figure. He played a minimal role at the coroner's inquest, and his participation related solely to his representation of a private client. He took no part in the criminal prosecution of officer Nuccio. Moreover, he never discussed either the criminal or civil litigation with the press and was never quoted as having done so. He plainly did not thrust himself into the vortex of this public issue, nor did he engage the public's attention in an attempt to influence its outcome. We are persuaded that the trial court did not err in refusing to characterize petitioner as a public figure for the purpose of this litigation.

We therefore conclude that the *New York Times* standard is inapplicable to this case and that the trial court erred in entering judgment for respondent. Because the jury was allowed to impose liability without fault and was permitted to presume damages without proof of injury, a new trial is necessary. We reverse and remand for further proceedings in accord with this opinion.

It is so ordered.

SUPREME COURT OF THE UNITED STATES

No. 72–617

Elmer Gertz, Petitioner,
v.
Robert Welch, Inc.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

[June 25, 1974]

MR. JUSTICE BLACKMUN, concurring.

I joined MR. JUSTICE BRENNAN'S opinion for the plurality in *Rosenbloom* v. *Metromedia, Inc.*, 403 U. S. 29 (1971). I did so because I concluded that, given *New York Times Co.* v. *Sullivan*, 376 U. S. 254 (1964), and its progeny (noted by the Court, *ante*, 10–12 n. 6), as well as *Curtis Publishing Co.* v. *Butts*, 388 U. S. 130 (1967), and *Associated Press* v. *Walker*, *ibid.*, the step taken in *Rosenbloom*, extending the *New York Times* doctrine to an event of public or general interest, was logical and inevitable. A majority of the Court evidently thought otherwise, as is particularly evidenced by MR. JUSTICE WHITE'S separate concurring opinion there and by the respective dissenting opinions of Mr. Justice Harlan and of MR. JUSTICE MARSHALL joined by MR. JUSTICE STEWART.

The Court today refuses to apply *New York Times* to the private individual, as contrasted with the public official and the public figure. It thus withdraws to the factual limits of the pre-*Rosenbloom* cases. It thereby fixes the outer boundary of the *New York Times* doctrine and says that beyond that boundary, a State is free to define for itself the appropriate standard of a media's liability so long as it does not impose liability without fault. As my joinder in *Rosenbloom's* plurality opinion would intimate, I sense some illogic in this.

The Court, however, seeks today to strike a balance between competing values where necessarily uncertain assumptions about human behavior color the result. Although the Court's opinion in the present case departs from the rationale of the *Rosenbloom* plurality, in that the Court now conditions a libel action by a private person upon a showing of negligence, as contrasted with a showing of willful or reckless disregard, I am willing to join, and do join, the Court's opinion and its judgment for two reasons:

1. By removing the spectres of presumed and punitive damages in the absence of *New York Times* malice, the Court eliminates significant and powerful motives for self-censorship that otherwise are present in the traditional libel action. By so doing, the Court leaves what should prove to be sufficient and adequate breathing space for a vigorous press. What the Court has done, I believe, will have little, if any, practical effect on the functioning of responsible journalism.

2. The Court was sadly fractionated in *Rosenbloom*. A result of that kind inevitably leads to uncertainty. I feel that it is of profound importance for the Court to come to rest in the defamation area and to have a clearly defined majority position that eliminates the unsureness engendered by *Rosenbloom*'s diversity. If my vote were not needed to create a majority, I would adhere to my prior view. A definitive ruling, however, is paramount. See *Curtis Publishing Co.* v. *Butts*, 388 U. S., at 170 (Black, J., concurring); *Time, Inc.* v. *Hill*, 385 U. S. 374, 398 (1967) (Black, J., concurring); *United States* v. *Vuitch*, 402 U. S. 62, 97 (1971) (separate statement).

For these reasons, I join the opinion and the judgment of the Court.

SUPREME COURT OF THE UNITED STATES

No. 72–617

Elmer Gertz, Petitioner,
v.
Robert Welch, Inc.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

[June 25, 1974]

MR. CHIEF JUSTICE BURGER, dissenting.

The doctrines of the law of defamation have had a gradual evolution primarily in the state courts. In *New York Times Co.* v. *Sullivan*, 376 U. S. 254 (1964), and its progeny this Court entered this field.

Agreement or disagreement with the law as it has evolved to this time does not alter the fact that it has been orderly development with a consistent basic rationale. In today's opinion the Court abandons the traditional thread so far as the ordinary private citizen is concerned and introduces the concept that the media will be liable for negligence in publishing defamatory statements with respect to such persons. Although I agree with much of what MR. JUSTICE WHITE states, I do not read the Court's new doctrinal approach in quite the way he does. I am frank to say I do not know the parameters of a "negligence" doctrine as applied to the news media. Conceivably this new doctrine could inhibit some editors, as the dissents of MR. JUSTICE DOUGLAS and MR. JUSTICE BRENNAN suggest. But I would prefer to allow this area of law to continue to evolve as it has up to now with respect to private citizens rather than embark on a new doctrinal theory which has no jurisprudential ancestry.

The petitioner here was performing a professional representative role as an advocate in the highest tradition of the law, and under that tradition the advocate is not to

be invidiously identified with his client. The important public policy which underlies this tradition—the right to counsel—would be gravely jeopardized if every lawyer who takes an "unpopular" case, civil or criminal, would automatically become fair game for irresponsible reporters and editors who might, for example, describe the lawyer as a "mob mouthpiece" for representing a client with a serious prior criminal record, or as an "ambulance chaser" for representing a claimant in a personal injury action.

I would reverse the judgment of the Court of Appeals and remand for reinstatement of the verdict of the jury and the entry of an appropriate judgment on that verdict.

SUPREME COURT OF THE UNITED STATES

No. 72–617

Elmer Gertz, Petitioner,
v.
Robert Welch, Inc.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

[June 25, 1974]

MR. JUSTICE DOUGLAS, dissenting.

The Court describes this case as a return to the struggle of "defin[ing] the proper accommodation between the law of defamation and the freedoms of speech and press protected by the First Amendment." It is indeed a struggle, once described by Mr. Justice Black as "the same quagmire" in which the Court "is helplessly struggling in the field of obscenity." *Curtis Publishing Co.* v. *Butts*, 388 U. S. 130, 171 (concurring). I would suggest that the struggle is a quite hopeless one, for, in light of the command of the First Amendment, no "accommodation" of its freedoms can be "proper" except those made by the Framers themselves.

Unlike the right of privacy which, by the terms of the Fourth Amendment, must be accommodated with reasonable searches and seizures and warrants issued by magistrates, the rights of free speech and of a free press were protected by the Framers in verbiage whose prescription seems clear. I have stated before my view that the First Amendment would bar Congress from passing any libel law.[1] This was the view held by Thomas Jefferson[2] and it is one Congress has

[1] See, *e. g.*, *Rosenblatt* v. *Baer*, 383 U. S. 75, 90 (concurring).

[2] In 1798 Jefferson stated:

"[The First Amendment] thereby guard[s] in the same sentence, and under the same words, the freedom of religion, of speech and of

never challenged through enaction of a civil libel statute. The sole congressional attempt at this variety of First Amendment muzzle was in the Sedition Act of 1798—a criminal libel act never tested in this Court and one which expired by its terms three years after enactment. As President, Thomas Jefferson pardoned those who were convicted under the Act and fines levied in its prosecution were repaid by Act of Congress.[3] The general consensus was that the Act constituted a regrettable legislative exercise plainly in violation of the First Amendment.[4]

With the First Amendment made applicable to the States through the Fourteenth,[5] I do not see how States have any more ability to "accommodate" freedoms of speech or of the press than does Congress. This is true whether the form of the accommodation is civil or criminal since "[w]hat a State may not constitutionally bring about by means of a criminal statute is likewise beyond the reach of its civil law of libel." *New York Times Co.* v. *Sullivan*, 376 U. S. 254, 277. Like Congress, States are without power "to use a civil libel law or any other law to impose damages for merely discussing public affairs." *Id.*, at 295 (Black, J., concurring).[6]

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the press, insomuch that whatever violates either throws down the sanctuary which covers the others, *and that libels, falsehood and defamation, equally with heresy and false religion are withheld from the cognizance of federal tribunals . . . .*"

8 Jefferson, Writings (Ford ed. 1904), 464–465 (emphasis added).

[3] See, *e. g.*, Act of July 4, 1840, c. 45, 6 Stat. 802, accompanied by H. R. Rep. No. 86, 26th Cong., 1st Sess. (1840).

[4] Senator Calhoun in reporting to Congress assumed the invalidity of the Act to be a matter "which no one now doubts." Rep. with Senate Bill No. 122, 24th Cong., 1st Sess., 3 (1836).

[5] See *Stromberg* v. *California*, 283 U. S. 359, 368–369.

[6] Since this case involves a discussion of public affairs, I need not decide at this point whether the First Amendment prohibits all libel actions. "An unconditional right to say what one pleases about

Continued recognition of the possibility of state libel suits for public discussion of public issues leaves the freedom of speech honored by the Fourteenth Amendment a diluted version of First Amendment protection. This view is only possible if one accepts the position that the First Amendment is applicable to the States only through the Due Process Clause of the Fourteenth, due process

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public affairs is what I consider to be *the minimum guarantee* of the First Amendment." *New York Times Co.* v. *Sullivan, supra,* at 297 (Black, J., concurring) (emphasis added). But "public affairs" includes a great deal more than merely political affairs. Matters of science, economics, business, art, literature, etc., are all matters of interest to the general public. Indeeed, any matter of sufficient general interest to prompt media coverage may be said to be a public affair. Certainly police killings, "Communist conspiracies," and the like qualify.

A more regressive view of free speech has surfaced but it has thus far gained no judicial acceptance. Solicitor General Bork has stated that:

"Constitutional protection should be accorded only to speech that is explicitly political. There is no basis for judicial intervention to protect any other form of expression, be it scientific, literary or that variety of expression we call obscene or pornographic. Moreover, within that category of speech we ordinarly call political, there should be no constitutional obstruction to laws making criminal any speech that advocates forcible overthrow of the government or the violation of any law." Bork, Neutral Principles and Some First Amendment Problems, 47 Ind. L. J. 1, 20 (1971).

According to this view, Congress, upon finding a painting aesthetically displeasing or a novel poorly written or a revolutionary new scientific theory unsound could constitutionally prohibit exhibition of the painting, distribution of the book or discussion of the theory. Congress might also criminalize the advocacy of the violation of any law, apparently without regard to the law's constitutionality. Thus, were Congress to pass a blatantly invalid law such as one prohibiting newspaper editorials critical of the government, a publisher might be punished for advocating its violation. Similarly, the late Dr. Martin Luther King, Jr., could have been punished for advising Blacks to peacefully sit in the front of buses or to ask for service in restaurants segregated by law.

freedom of speech being only that freedom which this Court might deem to be "implicit in the concept of ordered liberty."[7] But the Court frequently has rested state free speech and free press decisions on the Fourteenth Amendment generally[8] rather than on the Due Process Clause alone. The Fourteenth Amendment speaks not only of due process but also of "privileges and immunities" of United States citizenship. I can conceive of no privilege or immunity with a higher claim to recognition against state abridgement than the freedoms of speech and of the press. In our federal system we are all subject to two governmental regimes, and freedoms of speech and of the press protected against the infringement of only one are quite illusory. The identity of the oppressor is, I would think, a matter of relative indifference to the oppressed.

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[7] See *Palko* v. *Connecticut*, 302 U. S. 319. As Justice Black has noted, by this view the test becomes "whether the government has an interest in abridging the right involved and, if so, whether that interest is of sufficient importance, *in the opinion of a majority of the Supreme Court*, to justify the government's action in doing so. Such a doctrine can be used to justify almost any government suppression of First Amendment freedoms. As I have stated many times before, I cannot subscribe to this doctrine because I believe that the First Amendment's unequivocal command that there shall be no abridgement of the rights of free speech shows that the men who drafted our Bill of Rights did all the 'balancing' that was to be done in this field." H. Black, A Constitutional Faith, at 52 (1968).

[8] See, *e. g.*, *Bridges* v. *California*, 314 U. S. 252, 263 n. 6 (1941) (Black, J.); *Murdock* v. *Pennsylvania*, 319 U. S. 105, 108 (1943) (Douglas, J.); *Saia* v. *New York*, 334 U. S. 558, 566 (1948) (Douglas, J.); *Talley* v. *California*, 362 U. S. 60, 62 (1960) (Black, J.); *De Gregory* v. *Attorney General*, 383 U. S. 825, 828 (1966) (Douglas, J.); *Elfbrandt* v. *Russell*, 384 U. S. 11, 18 (1966) (Douglas, J.); *Mills* v. *Alabama*, 384 U. S. 214, 218 (1966) (Black, J.); *Mine Workers* v. *Illinois Bar Assn.*, 389 U. S. 217, 221–222 and n. 4 (1967) (Black, J.).

There can be no doubt that a State impinges upon free and open discussion when it sanctions the imposition of damages for such discussion through its civil libel laws. Discussion of public affairs is often marked by highly charged emotions, and jurymen, not unlike us all, are subject to those emotions. It is indeed this very type of speech which is the reason for the First Amendment since speech which arouses little emotion is little in need of protection. The vehicle for publication in this case was the American Opinion, a most controversial periodical which disseminates the views of the John Birch Society, an organization which many deem to be quite offensive. The subject matter involved "Communist plots," "conspiracies against law enforcement agencies," and the killing of a private citizen by the police. With any such amalgam of controversial elements pressing upon the jury, a jury determination, unpredictable in the most docile of circumstances, becomes for those who venture to discuss heated issues, a virtual roll of the dice separating them from liability for often massive claims of damage.

It is only the hardy publisher who will engage in discussion in the face of such risk, and the Court's preoccupation with proliferating standards in the area of libel increases the risks. It matters little whether the standard be articulated as "malice" or "reckless disregard of the truth" or "negligence," for jury determinations by any of those criteria are virtually unreviewable. This Court, in its continuing delineation of variegated mantles of First Amendment protection, is, like the potential publisher, left with only speculation on how jury findings were influenced by the effect the subject matter of the publication had upon the minds and viscera of the jury. The standard announced today leaves the States free to "define for themselves the appropriate standard of liability for a publisher or broadcaster" in

the circumstances of this case. This of course leaves the simple negligence standard as an option, with the jury free to impose damages upon a finding that the publisher failed to act as "a reasonable man." With such continued erosion of First Amendment protection, I fear that it may well be the reasonable man who refrains from speaking.

Since in my view the First and Fourteenth Amendments prohibit the imposition of damages upon respondent for this discussion of public affairs, I would affirm the judgment below.

SUPREME COURT OF THE UNITED STATES

No. 72–617

Elmer Gertz, Petitioner, v. Robert Welch, Inc. | On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

[June 25, 1974]

MR. JUSTICE BRENNAN, dissenting.

I agree with the conclusion, expressed in Part V of the Court's opinion, that, at the time of publication of respondent's article, petitioner could not properly have been viewed as either a "public official" or "public figure"; instead, respondent's article, dealing with an alleged conspiracy to discredit local police forces, concerned petitioner's purported involvement in "an event of public or general interest." *Rosenbloom* v. *Metromedia, Inc.*, 403 U. S. 29, 31–32 (1971); see pp. 7–8 n. 4, *ante*. I cannot agree, however, that free and robust debate—so essential to the proper functioning of our system of government— is permitted adequate "breathing space," *N. A. A. C. P.* v. *Button*, 371 U. S. 415, 433 (1963), when, as the Court holds, the States may impose all but strict liability for defamation if the defamed party is a private person and "the substance of the defamatory statement 'makes substantial danger to reputation apparent.'" *Ante*, p. 24.[1] I adhere to my view expressed in *Rosenbloom* v. *Metromedia, Inc.*, *supra*, that we strike the proper accommodation between avoidance of media self-censorship and protection of individual reputations only

[1] *A fortiori* I disagree with my Brother WHITE's view that the States should have free rein to impose strict liability for defamation in cases not involving public persons.

when we require States to apply, the *New York Times Co.* v. *Sullivan*, 376 U. S. 254 (1964), knowing-or-reckless-falsity standard in civil libel actions concerning media reports of the involvement of private individuals in events of public or general interest.

The Court does not hold that First Amendment guarantees do not extend to speech concerning private persons' involvement in events or public or general interest. It recognizes that self-governance in this country perseveres because of our "profound national commitment to the principle that debate on *public issues* should be uninhibited, robust, and wide-open." *New York Times Co.* v. *Sullivan*, *supra*, at 270 (emphasis added). Thus, guarantees of free speech and press necessarily reach "far more than knowledge and debate about the strictly official activities of various levels of government," *Rosenbloom* v. *Metromedia, Inc.*, *supra*, at 41; for "[f]reedom of discussion, if it would fulfill its historic function in this nation, must embrace all issues about which information is needed or appropriate to enable members of society to cope with the exigencies of their period." *Thornhill* v. *Alabama*, 310 U. S. 88, 102 (1940).

The teaching to be distilled from our prior cases is that, while public interest in events may at times be influenced by the notoriety of the individuals involved, "[t]he public's primary interest is in the event[,] . . . the conduct of the participant and the content, effect, and significance of the conduct. . . ." *Rosenbloom*, *supra*, at 43. Matters of public or general interest do not "suddenly become less so merely because a private individual is involved, or because in some sense the individual did not 'voluntarily' choose to become involved." *Ibid.* See *Times, Inc.* v. *Hill*, 385 U. S. 374, 388 (1967).

Although acknowledging that First Amendment values are of no less significance when media reports concern

private persons' involvement in matters of public concern, the Court refuses to provide, in such cases, the same level of constitutional protection that has been afforded the media in the context of defamation of public persons. The accommodation that this Court has established between free speech and libel laws in cases involving public officials and public figures—that defamatory falsehood be shown by clear and convincing evidence to have been published with knowledge of falsity or with reckless disregard of truth—is not apt, the Court holds, because the private individual does not have the same degree of access to the media to rebut defamatory comments as does the public person and he has not voluntarily exposed himself to public scrutiny.

While these arguments are forcefully and eloquently presented, I cannot accept them for the reasons I stated in *Rosenbloom:*

> "The *New York Times* standard was applied to libel of a public official or public figure to give effect to the Amendment's function to encourage ventilation of public issues, not because the public official has any less interest in protecting his reputation than an individual in private life. While the argument that public figures need less protection because they can command media attention to counter criticism may be true for some very prominent people, even then it is the rare case where the denial overtakes the original charge. Denials, retractions, and corrections are not 'hot' news, and rarely receive the prominence of the original story. When the public official or public figure is a minor functionary, or has left the position that put him in the public eye . . . , the argument loses all of its force. In the vast majority of libels involving public officials or public figures, the ability to respond through the

> media will depend on the same complex factor on which the ability of a private individual depends: the unpredictable event of the media's continuing interest in the story. Thus the unproved, and highly improbable, generalization that an as yet [not fully defined] . . . class of 'public figures' involved in matters of public concern will be better able to respond through the media than private individuals also involved in such matters seems too insubstantial a reed on which to rest a constitutional distinction."

Moreover, the argument that private persons should not be required to prove *New York Times* knowing-or-reckless-falsity because they do not assume the risk of defamation by freely entering the public arena "bears little relationship either to the values protected by the First Amendment or to the nature of our society." *Rosenbloom, supra,* at 47. Social interaction exposes all of us to some degree of public view. This Court has observed that "[t]he risk of this exposure is an essential incident of life in a society which places a primary value of freedom of speech and of press." *Time, Inc.* v. *Hill, supra,* 385 U. S., at 388 (1967). Therefore,

> "[v]oluntarily or not, we are all 'public' men to some degree. Conversely, some aspects of the lives of even the most public men fall outside the area of matters of public or general concern. See . . . *Griswold* v. *Connecticut,* 381 U. S. 479 (1965). Thus, the idea that certain 'public' figures have voluntarily exposed their entire lives to public inspection, while private individuals have kept theirs carefully shrouded from public view is, at best, a legal fiction. In any event, such a distinction could easily produce the paradoxical result of dampening discussion of issues of public or general con-

> cern because they happen to involve private citizens while extending constitutional encouragement to discussion of aspects of the lives of 'public figures' that are not in the area of public or general concern." *Rosenbloom, supra,* at 48 (footnote omitted).

To be sure, no one commends publications which defame the good name and reputation of any person: "In an ideal world, the responsibility of the press would match the freedom and public trust given it." *Id.*, at 51.[2] Rather, as the Court agrees, some abuse of First Amendment freedoms is tolerated only to insure that would-be commentators on events of public or general interest are not "deterred from voicing their criticism, even though it is believed to be true and even though it is in fact true, because of doubt whether it can be proved in court or fear of the expense of having to do so." *New York Times Co.* v. *Sullivan, supra,* 376 U. S., at 279. The Court's holding and *a fortiori* my Brother

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[2] A respected commentator has observed that factors other than purely legal constraints operate to control the press:

"Traditions, attitudes, and general rules of political conduct are far more important controls. The fear of opening a credibility gap, and thereby lessening one's influence, holds some participants in check. Institutional pressures in large organizations, including some of the press, have a similar effect; it is difficult for an organization to have an open policy of making intentionally false accusations." T. Emerson, The System of Freedom of Expression 538 (1970).

Typical of the press' own ongoing self-evaluation is a proposal to establish a national news council, composed of members drawn from the public and the journalism profession, to examine and report on complaints concerning the accuracy and fairness of news reporting by the largest newsgathering sources. Report of the Twentieth Century Fund Task Force for a National News Council, A Free and Responsive Press (1973). See also Comment, the Expanding Constitutional Protection for the News Media from Liability for Defamation: Predictability and the New Synthesis, 70 Mich. L. Rev. 1547, 1569–1570 (1972).

WHITE's views, see n. 1, *supra*, simply deny free expression its needed "breathing space." Today's decision will exacerbate the rule of self-censorship of legitimate utterance as publishers "steer far wider of the unlawful zone," *Speiser* v. *Randall*, 357 U. S. 513, 526 (1958).

We recognized in *New York Times Co.* v. *Sullivan*, *supra*, at 279, that a rule requiring a critic of official conduct to guarantee the truth of all of his factual contentions would inevitably lead to self-censorship when publishers, fearful of being unable to prove truth or unable to bear the expense of attempting to do so, simply eschewed printing controversial articles. Adoption, by many States, of a reasonable care standard in cases where private individuals are involved in matters of public interest—the probable result of today's decision—will likewise lead to self-censorship since publishers will be required carefully to weigh a myriad of uncertain factors before publication. The reasonable care standard is "elusive," *Time, Inc.* v. *Hill*, *supra*, at 389; it saddles the press with "the intolerable burden of guessing how a jury might assess the reasonableness of steps taken by it to verify the accuracy of every reference to a name, picture or portrait." *Ibid.* Under a reasonable care regime, publishers and broadcasters will have to make pre-publication judgments about juror assessment of such diverse considerations as the size, operating procedures, and financial condition of the newsgathering system, as well as the relative costs and benefits of instituting less frequent and more costly reporting at a higher level of accuracy. See The Supreme Court 1970 Term, 85 Harv. L. Rev. 3, 228 (1971). Moreover, in contrast to proof by clear and convincing evidence required under the *Times* test, the burden of proof for reasonable care will doubtless be the preponderance of the evidence.

> "In the normal civil suit where [the preponderance of the evidence] standard is employed, 'we

> view it as no more serious in general for there to be an erroneous verdict in the defendant's favor than for there to be an erroneuos verdict in the plaintiff's favor.' *In re Winship*, 397 U. S. 358, 371 (1970) (HARLAN, J., concurring). In libel cases, however, we view an erroneous verdict for the plaintiff as most serious. Not only does it mulct the defendant for an innocent misstatement . . . but the possibility of such error, even beyond the vagueness of the negligence standard itself, would create a strong impetus toward self-censorship, which the First Amendment cannot tolerate." *Rosenbloom, supra*, at 50.

And most hazardous, the flexibility which inheres in the reasonable care standard will create the danger that a jury will convert it into "an instrument for the suppression of those 'vehement, caustic, and sometimes unpleasantly sharp attacks,' . . . which must be protected if the guarantees of the First and Fourteenth Amendments are to prevail." *Monitor Patriot Co.* v. *Roy*, 401 U. S. 265, 277 (1971).

The Court does not discount altogether the danger that jurors will punish for the expression of unpopular opinions. This probability accounts for the Court's limitation that "the States may not permit recovery of presumed or punative damages, at least when liability is not based on a showing of knowledge of falsity or reckless disregard for the truth." *Ante*, at p. 25. But plainly a jury's latitude to impose liability for want of due care poses a far greater threat of suppressing unpopular views than does a possible recovery of presumed or punitive damages. Moreover, the Court's broad-ranging examples of "actual injury," including impairment of reputation and standing in the community, as well as personal humiliation, and mental anguish and suffering, inevitably allow a jury bent on punishing expression of

unpopular views a formidable weapon for doing so. Finally, even a limitation of recovery to "actual injury"—however much it reduces the size or frequency of recoveries—will not provide the necessary elbow room for First Amendment expression.

> "It is not simply the possibility of a judgment for damages that results in self-censorship. The very possibility of having to engage in litigation, an expensive and protracted process, is threat enough to cause discussion and debate to 'steer far wider of the unlawful zone' thereby keeping protected discussion from public cognizance. . . . Too, a small newspaper suffers equally from a substantial damage award, whether the label of the award be 'actual' or 'punative.'" *Rosenbloom, supra,* at 52–53.

On the other hand, the uncertainties which the media face under today's decision are largely avoided by the *Times'* standard. I reject the argument that my *Rosenbloom* view improperly commits to judges the task of determining what is and what is not an issue of "general or public interest."[3] I noted in *Rosenbloom* that per-

[3] The Court, taking a novel step, would not limit application of First Amendment protection to private libels involving issues of general or public interest, but would forbid the States from imposing liability without fault in any case where the substance of the defamatory statement made substantial danger to reputation apparent. As in *Rosenbloom* v. *Metromedia, Inc.*, 403 U. S., at 44 n. 12, 48–49 n. 17, I would leave open the question of what constitutional standard, if any, applies when defamatory falsehoods are published or broadcast concerning either a private or public person's activities not within the scope of the general or public interest.

Parenthetically, my Brother WHITE argues that the Court's view and mine will prevent a plaintiff—unable to demonstrate some degree of fault—from vindicating his reputation by securing a judgment that the publication was false. This argument overlooks the possible enactment of statutes, not requiring proof of fault, which provide for an action for retraction or for publication of a court's

formance of this task would not always be easy. 403 U. S., at 49 n. 17. But surely the courts, the ultimate arbiters of all disputes concerning clashes of constitutional values, would only be performing one of their traditional functions in undertaking this duty. Also, the difficulty of this task has been substantially lessened by that "sizeable body of cases, decided both before and after *Rosenbloom*, that have employed the concept of a matter of public concern to reach decisions in . . . cases dealing with an alleged libel of a private individual that employed a public interest standard . . . and . . . cases that applied *Butts* to the alleged libel of a public figure." Comment, The Expanding Constitutional Protection for the News Media from Liability for Defamation: Predictability and the New Synthesis, 70 Mich. L. Rev. 1547, 1560 (1972). The public interest is necessarily broad; any residual self-censorship that may result from the uncertain contours of the "general or public interest" concept should be of far less concern to publishers and broadcasters than that occasioned by state laws imposing liability for negligent falsehood.

Since petitioner failed, after having been given a full and fair opportunity, to prove that respondent published the disputed article with knowledge of its falsity or with reckless disregard of the truth, see pp. 5–6 n. 2, *ante*, I would affirm the judgment of the Court of Appeals.

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determination of falsity if the plaintiff is able to demonstrate that false statements have been published concerning his activities. Cf. Note, Vindication of the Reputation of a Public Official, 80 Harv. L. Rev. 1730, 1739–1747 (1967). Although it may be that questions could be raised concerning the constitutionality of such statutes, certainly nothing I have said today (and, as I read the Court's opinion, nothing said there) should be read to imply that a private plaintiff, unable to prove fault, must inevitably be denied the opportunity to secure a judgment upon the truth or falsity of statements published about him. Cf. *Rosenbloom* v. *Metromedia, Inc.*, *supra*, at 47 & n. 15.

SUPREME COURT OF THE UNITED STATES

No. 72–617

Elmer Gertz, Petitioner,
v.
Robert Welch, Inc.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

[June 25, 1974]

MR. JUSTICE WHITE, dissenting.

For some 200 years—from the very founding of the Nation—the law of defamation and right of the ordinary citizen to recover for false publication injurious to his reputation have been almost exclusively the business of state courts and legislatures. Under typical state defamation law, the defamed private citizen had to prove only a false publication that would subject him to hatred, contempt or ridicule. Given such publication, general damages to reputation were presumed, while punitive damages required proof of additional facts. The law governing the defamation of private citizens remained untouched by the First Amendment because until relatively recently, the consistent view of the Court was that libelous words constitute a class of speech wholly unprotected by the First Amendment, subject only to limited exceptions carved out since 1964.

But now, using that amendment as the chosen instrument, the Court, in a few printed pages, has federalized major aspects of libel law by declaring unconstitutional in important respects the prevailing defamation law in all or most of the 50 States. That result is accomplished by requiring the plaintiff in each and every defamation action to prove not only the defendant's culpability beyond his act of publishing defamatory ma-

terial but also actual damage to reputation resulting from the publication. Moreover, punitive damages may not be recovered by showing malice in the traditional sense of ill will; knowing falsehood or reckless disregard of the truth will now be required.

I assume these sweeping changes will be popular with the press, but this is not the road to salvation for a court of law. As I see it, there are wholly insufficient grounds for scuttling the libel laws of the States in such wholesale fashion, to say nothing of deprecating the reputation interest of ordinary citizens and rendering them powerless to protect themselves. I do not suggest that the decision is illegitimate or beyond the bounds of judicial review, but it is an ill-considered exercise of the power entrusted to this Court, particularly when the Court has not had the benefit of briefs and argument addressed to most of the major issues which the Court now decides. I respectfully dissent.

I

Lest there be any mistake about it, the changes wrought by the Court's decision cut very deeply. In 1938, the Restatement of Torts reflected the historic rule that publication in written form of defamatory material—material tending "so to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating with him"[1]—subjected the publisher to liability although no special harm to reputation was actually proved.[2] Restatement

[1] Restatement of Torts § 559 (1938); see also W. Prosser, Handbook of the Law of Torts § 111, at 739 (4th ed. 1971); 1 A. Hanson, Libel and Related Torts ¶ 14, at 21–22 (1969); 1 F. Harper & F. James, Jr., The Law of Torts § 5.1, at 349–350 (1956).

[2] The observations in Part I of this opinion as to the current state of the law of defamation in the various States are partially based upon the Restatement of Torts, first published in 1938, and Tentative Drafts Nos. 11 and 12 of Restatement of Torts (Second), released

of Torts § 569 (1938).[3] Truth was a defense, and some libels were privileged; but given a false circulation, general damages to reputation were presumed and could be awarded by the jury, along with any special damages such as pecuniary loss and emotional distress. At the very least, the rule allowed the recovery of nominal damages for any defamatory publication actionable *per se* and thus performed

> "a vindicatory function by enabling the plaintiff publicly to brand the defamatory publication as false. The salutary social value of this rule is preventive in character since it often permits a defamed person to express the groundless character of a defamatory rumor before harm to the reputation has resulted therefrom." *Id.*, § 569, comment b, at 166.

If the defamation was not libel but slander, it was

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in 1965 and 1966, respectively. The recent transmittal of Tentative Draft No. 20, dated April 25, 1974, to the American Law Institute for its consideration has resulted in the elimination of much of the discussion of the prevailing defamation rules and the suggested changes in many of the rules themselves previously found in the earlier Tentative Drafts. This development appears to have been largely influenced by the draftsmen's "sense for where the law of this important subject should be thought to stand." Restatement of Torts (Second) vii (Tent. Draft No. 20, April 25, 1974). It is evident that, to a large extent, these latest views are colored by this Court's plurality opinion in *Rosenbloom* v. *Metromedia, Inc.*, 403 U. S. 29 (1971). See, *e. g.*, Restatement of Torts (Second), *supra*, at xiii, §§ 569, 580, 581A, 581B, 621. There is no indication in the latest draft, however, that the conclusions reached in Tentative Drafts Nos. 11 and 12 are not an accurate reflection of the case law in the States in the mid-1960's prior to the developments occasioned by the plurality opinion in *Rosenbloom*. See pp. 4–6, *infra*.

[3] See also W. Prosser, *supra*, n. 1, § 112, at 752 & n. 85; Murnaghan, From Figment to Fiction to Philosophy—The Requirement of Proof of Damages in Libel Actions, 22 Cath. U. L. Rev. 1, 11–13 (1972).

actionable *per se* only if it imputed a criminal offense; a venereal or loathsome and communicable disease; improper conduct of a lawful business; or unchastity by a woman. *Id.*, § 570. To be actionable, all other types of slanderous statements required proof of special damages other than actual loss of reputation or emotional distress, those special damages almost always being in the form of material or pecuniary loss of some kind. *Id.*, § 575 and comment b, at 185–189.

Damage for libel or slander *per se* included "harm caused thereby to the reputation of the person defamed or in the absence of proof of such harm, for the harm which normally results from such publication. *Id.*, § 621. At the heart of the libel and slander *per se* damage scheme lay the award of general damages for loss of reputation. They were granted without special proof because the judgment of history was that the content of the publication itself was so likely to cause injury and because "in many cases the effect of defamatory statements is so subtle and indirect that it is impossible directly to trace the effects therefrom in loss to the person defamed." *Id.*, § 621, comment a, at 314.[4] Proof of actual injury to reputation was itself insufficient proof of those special damages necessary to support liability for slander

[4] Proof of the defamation itself established the fact of injury and the existence of some damage to the right of reputation, and the jury was permitted, even without any other evidence, to assess damages that were considered to be the natural or probable consequences of the defamatory words. Restatement of Torts § 621, comment a, at 314; see also Gatley on Libel and Slander 1004 (6th ed. 1967); M. Newell, Slander and Libel § 721, at 810 (4th ed. 1924), see generally C. McCormick, Handbook on the Law of Damages § 116, at 422–430 (1935). In this respect, therefore, the damages were presumed because of the impossibility of affixing an exact monetary amount for present and future injury to the plaintiff's reputation, wounded feelings and humiliation, loss of business, and any consequential physical illness or pain. C. McCormick, *supra*, § 116, at 422–430.

not actionable *per se*. But if special damages in the form of material or pecuniary loss were proved, general damages for injury to reputation could be had without further proof. "The plaintiff may recover not only for special harm so caused, but also for general loss of reputation." *Id.*, § 575, comment a, at 185.[5] The right to recover for emotional distress depended upon the defendant otherwise being liable for either libel or slander. *Id.*, § 623. Punitive damages were recoverable upon proof of special facts amounting to express malice. *Id.*, § 908 and comment b, at 555.

Preparations in the mid-1960's for Restatement of Torts (Second) reflected what were deemed to be substantial changes in the law of defamation, primarily a trend toward limiting *per se* libels to those where the defamatory nature of the publication is aparent on its face, *i. e.*, where the "defamatory innuendo is apparent from the publication itself without reference to extrinsic facts by way of inducement." American Law Institute, Restatement of Torts (Second) § 569, at 29 (Tent. Draft No. 12, April 27, 1966). Libels of this sort and slanders *per se* continued to be recognized as actionable without proof of special damages or injury to reputation.[6] All other defamations would require proof of special injury in the form of material or pecuniary loss. Whether this asserted change reflected the prevailing law was heavily debated,[7] but it was unquestioned at the time that there

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[5] See also W. Prosser, *supra*, n. 1, § 112, at 761; F. Harper & F. James, Jr., *supra*, n. 1, § 5.14, at 388; Note, Developments in the Law—Defamation, 69 Harv. L. Rev. 875, 939–940 (1956).

[6] Also actionable *per se* were those libels where the imputation, although not apparent from the material itself, would have been slander *per se* if spoken rather than written.

[7] American Law Institute, Restatement of Torts (Second) § 559, at 29–45, 47–48 (Tent. Draft No. 12, April 27, 1966); see also Murnaghan, *supra*, n. 3.

are recurring situations in which libel and slander are and should be actionable *per se*.

In surveying the current state of the law, the proposed Restatement (Second) observed that "[a]ll courts except Virginia agree that any libel which is defamatory upon its face is actionable without proof of damage . . . ." American Law Institute, Restatement of Torts (Second) § 569, at 84 (Tent. Draft No. 11, April 15, 1965). Ten jurisdictions continued to support the old rule that libel not defamatory on its face and whose innuendo depends on extrinsic facts is actionable without proof of damage although slander would not be. Twenty-four jurisdictions were said to hold that libel not defamatory on its face is to be treated like slander and thus not actionable without proof of damage where slander would not be. *Id.*, at 86. The law in six jurisdictions was found to be in an unsettled state but most likely consistent with the Restatement (Second). *Id.*, at 88. The law in Virginia was thought to consider libel actionable without proof of special damage only where slander would be, regardless of whether the libel is defamatory on its face. *Id.*, at 89. All States, therefore, were at that time thought to recognize important categories of defamation that were actionable *per se*.[8] Nor was any question apparently raised at that time that upon proof of special damage in the form of material or pecuniary loss, general damages to reputation could be recovered without further proof.

Unquestionably, state law continued to recognize some absolute, as well as some conditional, privileges to publish defamatory materials, including the privilege of fair comment in defined situations. But it remained true that in

[8] Applying settled Illinois law, the District Court in this case held that it is libel *per se* to label someone a Communist. *Gertz* v. *Robert Welch, Inc.*, 306 F. Supp. 310 (ND Ill. 1969).

a wide range of situations, the ordinary citizen could make out a prima facie case without proving more than a defamatory publication and could recover general damages for injury to his reputation unless defeated by the defense of truth.[9]

The impact of today's decision on the traditional law of libel is immediately obvious and indisputable. No longer will the plaintiff be able to rest his case with proof of a libel defamatory on its face or proof of a slander historically actionable *per se*. In addition, he must prove some further degree of culpable conduct on the part of the publisher, such as intentional or reckless falsehood or negligence. And if he succeeds in this respect, he faces still another obstacle: recovery for loss of reputation will be conditioned upon "competent" proof of actual injury to his standing in the community. This will be true regardless of the nature of the defamation and even though it is one of those particularly reprehensible statements that have traditionally made slanderous words actionable without proof of fault by the publisher or of the damaging impact of his publication. The Court rejects the judgment of experience that some publications are so inherently capable of injury, and actual injury so difficult to prove, that the risk of falsehood should be borne by the publisher, not the victim. Plainly, with the additional burden on the plaintiff of proving negligence or other fault, it will be exceedingly difficult, perhaps impossible, for him to vindicate his reputation interest by securing a judgment for nominal damages, the practical effect of such a judgment being

[9] This appears to be the law in Illinois at the time Gertz brought his libel suit. See, *e. g.*, *Brewer* v. *Hearst Publishing Co.*, 185 F. 2d 846 (CA7 1950); *Holtz* v. *Alton Telegraph Printing Co.*, 324 Ill. App. 1, 57 N. E. 2d 137 (1944); *Cooper* v. *Illinois Publishing & Printing Co.*, 218 Ill. App. 95 (1920).

a judicial declaration that the publication was indeed false. Under the new rule the plaintiff can lose, not because the statement is true, but because it was not negligently made.

So too, the requirement of proving special injury to reputation before general damages may be awarded will clearly eliminate the prevailing rule, worked out over a very long period of time, that, in the case of defamations not actionable *per se*, the recovery of general damages for injury to reputation may also be had if some form of material or pecuniary loss is proved. Finally, an inflexible federal standard is imposed for the award of punitive damages. No longer will it be enough to prove ill will and an attempt to injure.

These are radical changes in the law and severe invasions of the prerogatives of the States. They should at least be shown to be required by the First Amendment or necessitated by our present circumstances. Neither has been demonstrated.

Of course, *New York Times* v. *Sullivan*, 376 U. S. 254 (1964) *Rosenblatt* v. *Baer*, 383 U. S. 75 (1966), *Curtis Publishing Co.* v. *Butts* and *Associated Press* v. *Walker*, 388 U. S. 130 (1967), have themselves worked major changes in defamation law. Public officials and public figures, if they are to recover general damages for injury to reputation, must prove knowing falsehood or reckless disregard for the truth. The States were required to conform to these decisions. Thereafter in *Rosenbloom* v. *Metromedia*, 403 U. S. 29 (1971), three Members of the Court urged that the same standard be applied whenever the publication concerned an event of public or general concern. But none of these cases purported to foreclose in all circumstances recovery by the ordinary citizen on traditional standards of liability, and until today, a majority of the Court had not supported the proposition that given liability, a court or jury may not

award general damages in a reasonable amount without further proof of injury.

In the brief period since *Rosenbloom* was decided, at least 17 States and several United States Courts of Appeals have felt obliged to consider the *New York Times* constitutional privilege for liability as extending to, in the words of the *Rosenbloom* plurality, "all discussion and communication involving matters of public or general concern." [10] Apparently, however,

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[10] See, *e. g.*, *West* v. *Northern Publishing Co.*, 487 P. 2d 1304, 1305–1306 (Alaska Sup. Ct. 1971) (article linking owners of taxicab companies to illegal liquor sales to minors); *Gallman* v. *Carnes*, 497 S. W. 2d 47, 50 (Ark. Sup. Ct. 1973) (matter concerning state law school professor and assistant dean); *Belli* v. *Curtis Publ. Co.*, 25 CA 3d 384, 102 Cal. Rptr. 122 (1972) (article concerning attorney with national reputation); *Moriarty* v. *Lippe*, 162 Conn. 371, 378–379, 294 A. 2d 326 (1972) (publication about certain police officers); *Firestone* v. *Time, Inc.*, 271 So. 2d 745, 750–751 (Fla. Sup. Ct. 1972) (divorce of prominent citizen not a matter of legitimate public concern); *State* v. *Snyder*, 277 So. 2d 660, 664–668 (La. Sup. Ct. 1973) (criminal defamation prosecution of a defeated mayoral candidate for statements made about another candidate); *Twohig* v. *Boston Herald-Traveler Corp.*, 291 N. E. 2d 398, 400–401 (Mass. Sup. Jud. Ct. 1973) (article concerning a candidate's votes in the legislature); *Priestley* v. *Hastings & Sons Publishing Co. of Lynn*, 271 N. E. 2d 628 (Mass. Sup. Jud. Ct. 1971) (article about an architect commissioned by a town to build a school); *Harnish* v. *Herald-Mail Co., Inc.*, 264 Md. 326, 334–336, 286 A. 2d 146 (1972) (article concerning substandard rental property owned by a member of a city housing authority); *Standke* v. *B. E. Darby & Sons, Inc.*, 291 Minn. 468, 476–477, 193 N. W. 2d 139 (1971) (newspaper editorial concerning performance of grand jurors); *Whitmore* v. *Kansas City Star Co.*, 499 S. W. 2d 45, 49 (Mo. Ct. App. 1973) (article concerning juvenile officer, the operation of a detention home and a grand jury investigation); *Trails West, Inc.* v. *Wolff*, 32 N. Y. 2d 207, 214–218, 344 N. Y. S. 2d 863, 298 N. E. 2d 52 (1973) (suit against a Congressman for an investigation into the death of school children in a bus accident); *Twenty-Five East 40th Street Restaurant Corp.* v. *Forbes, Inc.*, 30 N. Y. 2d 595, 331 N. Y. 2d 29,

general damages still remain recoverable once that standard of liability is satisfied. Except where public officials and public figures are concerned, the Court now repudi-

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282 N. E. 2d 118 (1972) (magazine article concerning a restaurant's food); *Kent* v. *City of Buffalo*, 29 N. Y. 2d 818, 327 N. Y. 2d 653, 277 N. E. 2d 669 (1971) (television station film of plaintiff as a captured robber); *Frink* v. *McEldowney*, 29 N. Y. 2d 720, 325 N. Y. S. 2d 755, 275 N. E. 2d 337 (1971) (article concerning an attorney representing a town); *Mead* v. *Horvitz Publishing Co.* (9th Dist. Ohio Ct. App. June 13, 1973) (unpublished), cert. denied, — U. S. — (1974) (financial condition of participants in the development of a large apartment complex involving numerous local contractors); *Washington* v. *World Publishing Co.*, 506 P. 2d 913 (Okla. Sup. Ct. 1973) (article about contract dispute between a candidate for United States Senate and his party's county chairman); *Matus* v. *Triangle Publications, Inc.*, 445 Pa. 384, 395–399, 286 A. 2d 357 (1971) (radio "talk show" host's discussion of gross overcharging for snowplowing a driveway not considered an event of public or general concern); *Autobuses Internacionales S. De R.L., Ltd.* v. *El Continental Publ. Co.*, 483 S. W. 2d 506 (Tex. Ct. Civ. App. 1972) (newspaper article concerning a bus company's raising of fares without notice and in violation of law); *Sanders* v. *Harris*, 213 Va. 369, 372–373, 192 S. E. 2d 754 (1972) (article concerning college English professor at a community college); *Old Dominion Branch No. 496* v. *Austin*, 213 Va. 377, 192 S. E. 2d 737 (1972), rev'd, — U. S. — (1974) (plaintiff's failure to join a labor union considered not an issue of public or general concern); *Chase* v. *Daily Record, Inc.*, 83 Wash. 2d 37, 41, 515 P. 2d 154 (1973) (article concerning port district commissioner); *Miller* v. *Argus Publishing Co.*, 79 Wash. 2d 816, 827, 490 P. 2d 101 (1971) (article concerning the backer of political candidates); *Polzin* v. *Helmbrecht*, 54 Wis. 2d 578, 586, 196 N. W. 2d 685 (1972) (letter to editor of newspaper concerning a reporter and the financing of pollution control measures).

The following United States Courts of Appeals have adopted the plurality opinion in *Rosenbloom: Cantrell* v. *Forest City Publishing Co.*, 484 F. 2d 150 (CA6 1973) (article concerning family members of the victim of a highly publicized bridge disaster not actionable absent proof of actual malice); *Porter* v. *Guam Publications, Inc.*, 475 F. 2d 744, 745 (CA9 1973) (article concerning citizen's arrest for theft

ates the plurality opinion in *Rosenbloom* and appears to espouse the liability standard set forth by three other Justices in that case. The States must now struggle to discern the meaning of such ill-defined concepts as "liability without fault" and to fashion novel rules for the recovery of damages. These matters have not been briefed or argued by the parties and their workability has not been seriously explored. Nevertheless, yielding to the apparently irresistible impulse to announce a new and different interpretation of the First Amendment, the Court discards history and precedent in its rush to refashion defamation law in accordance with the inclinations of a perhaps evanescent majority of the Justices.

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of a cash box considered an event of general or public interest); *Cervantes* v. *Time, Inc.*, 464 F. 2d 986, 991 (CA8 1972) (article concerning mayor and alleged organized crime connections conceded to be a matter of public or general concern); *Firestone* v. *Time, Inc.*, 460 F. 2d 712 (CA5 1972) (magazine article concerning prominent citizen's use of detectives and electronic surveillance in connection with a divorce); *Davis* v. *National Broadcasting Co.*, 320 F. Supp. 1070 (ED La. 1970), aff'd, 447 F. 2d 981 (CA5 1971) (television report about a person caught up in the events surrounding the assassination of President Kennedy considered a matter of public interest). However, at least one Court of Appeals, faced with an appeal from summary judgment in favor of a publisher in a diversity libel suit brought by a Philadelphia retailer, has expressed "discomfort in accepting the *Rosenbloom* plurality opinion as a definitive statement of the appropriate law . . . ." *Gordon* v. *Random House, Inc.*, 486 F. 2d 1356, 1359 (CA3 1973).

As previously discussed in n. 2, *supra*, the latest proposed draft of Restatement of Torts (Second) substantially reflects the views of the *Rosenbloom* plurality. It also anticipates "that the Supreme Court will hold that strict liability for defamation is inconsistent with the free-speech provision of the First Amendment . . . ," American Law Institute, Restatement of Torts (Second) § 569, at 59 (Tent. Draft No. 20, April 25, 1974), as well as the demise of pre-*Rosenbloom* damage rules. See § 621, at 285–288.

II

The Court does not contend, and it could hardly do so, that those who wrote the First Amendment intended to forbid the Federal Government, within its sphere of influence in the territories and the District of Columbia, from providing the private citizen a peaceful remedy for damaging falsehood. At the time of the adoption of the First Amendment, many of the consequences of libel law already described had developed, particularly the rule that libels and some slanders were so inherently injurious that they were actionable without special proof of damage to reputation. As the Court pointed out in *Roth* v. *United States*, 354 U. S. 476, 482 (1957), 10 of the 14 States that had ratified the Constitution by 1792 had themselves provided constitutional guarantees for free expression, and 13 of the 14 nevertheless provided for the prosecution of libels. Prior to the Revolution, the American colonies had adopted the common law of libel.[11] Contrary to some popular notions, freedom of the press was sharply curtailed in colonial America.[12] Seditious libel was punished as a contempt by the colonial legislatures and as a criminal offense in the colonial courts.[13]

Scant, if any, evidence exists that the First Amendment was intended to abolish the common law of libel, at least to the extent of depriving ordinary citizens of meaningful redress against their defamers. On the contrary,

> "[i]t is conceded on all sides that the common law rules that subjected the libeler to responsibility for

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[11] Merin, Libel and the Supreme Court, 11 Wm. & Mary L. Rev. 371, 373 (1969).

[12] A. Sutherland, Constitutionalism in America: Origin and Evaluation of Its Fundamental Ideas 118–119 (1965).

[13] See generally, L. Levy, Legacy of Suppression: Freedom of Speech and Press in Early American History (1960).

> the private injury, or the public scandal or disorder occasioned by his conduct, are not abolished by protection extended to the press in our own constitutions." 2 Cooley, Constitutional Limitations 883 (8th ed. 1927).

Moreover, consistent with the Blackstonian formula,[14] these common-law actions did not abridge freedom of the press. See generally Levy, Legacy of Suppression: Freedom of Speech and Press in Early American History 247–248 (1960); Merin, Libel and the Supreme Court, 11 Wm. & Mary L. Rev. 371, 376 (1969); Hallen, Fair Comment, 8 Tex. L. Rev. 41, 56 (1929). Alexander Meiklejohn, who accorded generous reach to the First Amendment, nevertheless acknowledged:

> "No one can doubt, in any well-governed society, the legislature has both the right and the duty to prohibit certain forms of speech. Libelous assertions may be, and must be, forbidden and punished. So too must slander . . . . All these necessities that speech may be limited are recognized and provided under the Constitution. They were not unknown to the writers of the First Amendment. That amendment, then we may take it for granted, *does not forbid the abridging of speech.* But, at the same

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[14] The men who wrote and adopted the First Amendment were steeped in the common-law tradition of England. They read Blackstone, "a classic tradition of the bar in the United States" and "the oracle of the common law in the minds of the American framers . . . ." W. Hurst, The Growth of the American Law: The Law Makers 257 (1950); L. Levy, *supra*, n. 13, at 13; see also A. Sutherland, *supra*, n. 12, at 124–125; *Schick* v. *United States*, 195 U. S. 65, 69 (1904). From him they learned that the major function of speech and press was to prevent prior restraints, the publisher later being subject to legal action if his publication was injurious. 4 W. Blackstone's Commentaries 150–153 (Lewis ed. 1897).

> time, *it does forbid the abridging of the freedom of speech.* It is to the solving of that paradox, that apparent self-contradiction, that we are summoned if, as free men, we wish to know what the right of freedom of speech is." A. Meiklejohn, Political Freedom, The Constitutional Powers of the People 21 (1965); see also Leflar, The Free-ness of Free Speech, 15 Vand. L. Rev. 1073, 1080–1081 (1962).

Professor Chaffee, a noted First Amendment scholar, has persuasively argued that conditions in 1791 "do not arbitrarily fix the division between lawful and unlawful speech for all time." Z. Chaffee, Jr., Free Speech in the United States 14 (1954).[15] At the same time, however, he notes that while the Framers may have intended to abolish seditious libels and to prevent any prosecutions by the Federal Government for criticism of the government,[16] "the free speech clauses do not wipe out the

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[15] See also Meiklejohn, The First Amendment Is An Absolute, 1961 Sup. Ct. Rev. 245, 264:

"First, the Framers initiated a political revolution whose development is still in process throughout the world. Second, like most revolutionaries, the Framers could not foresee the specific issues which which would arise as their 'novel idea' exercised its domination over the governing activities of a world. In that sense, the Framers did not know what they were doing. And in that same sense, it is still true that, after two centuries of experience, we do not know what they were doing, or what we ourselves are now doing.

"In a more abstract and more significant sense, however, both they and we have been aware that the adoption of the principle of self-government by 'The People' of this nation set loose upon us and upon the world at large an idea which is still transforming men's conceptions of what they are and how they may best be governed."

[16] See *Beauharnais* v. *Illinois*, 343 U. S. 250, 272 (1952) (Black, J., dissenting). Brandt, who interprets the Framers' intention more liberally than Chaffee, nevertheless saw the free-speech protection as bearing upon criticism of government and other political speech. I, Brandt, The Bill of Rights 236 (1965).

common law as to obscenity, profanity, and defamation of individuals." [17]

The debates in Congress and the States over the Bill of Rights are unclear and inconclusive on any articulated intention of the Framers as to the free press guarantee.[18] We know that Ben Franklin, John Adams, and William Cushing favored limiting freedom of the press to truthful statements, while others such as James Wilson suggested a restatement of the Blackstonian standard.[19] Jefferson endorsed Madison's formula that "Congress shall make no law . . . abridging the freedom of speech or the press" only after he suggested:

> "The people shall not be deprived of their right to speak, to write or *otherwise* publish anything but false facts affecting injuriously the life, liberty, or reputation of others . . . ." F. Mott, Jefferson and the Press 14 (1943).[20]

Doubt has been expressed that the Members of Con-

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[17] Z. Chaffee, Jr., *supra*, at 14.

[18] See 1 Annals of Cong. 729–808 (1789). See also I. Brandt, *supra*, n. 16, at 224; L. Levy, *supra*, n. 13, at 214, 224.

[19] Merin, *supra*, n. 11, at 377. Franklin, for example, observed: "If by the *Liberty of the Press* were understood merely the Liberty of discussing the Propriety of Public Measures and political opinions, let us have as much of it as you please: But if it means the Liberty of affronting, calumniating, and defaming one another, I, for my part, own myself willing to part with my Share of it when our Legislators shall please so to alter the Law, and shall cheerfully consent to exchange my *Liberty* of Abusing others for the Privilege of not being abus'd myself." X The Writings of Benjamin Franklin 38 (Smyth ed. 1907).

[20] Jefferson's noted opposition to public prosecutions for libel of government figures did not extend to depriving them of private libel actions. Mott, *supra*, at 43. There is even a strong suggestion that he favored state prosecutions. E. Hudon, Freedom of Speech and Press in America 47–48 (1963).

gress envisioned the First Amendment as reaching even this far. Merin, *supra*, n. 11, at 379–380.

This Court in bygone years has repeatedly dealt with libel and slander actions from the District of Columbia and from the territories. Although in these cases First Amendment considerations were not expressly discussed, the opinions of the Court unmistakably revealed that the classic law of libel was firmly in place in those areas where federal law controlled. See, *e. g.*, *Washington Post Co.* v. *Chaloner*, 250 U. S. 290 (1919); *Baker* v. *Warner*, 231 U. S. 588 (1913); *Nalle* v. *Oyster*, 230 U. S. 165 (1913); *Dorr* v. *United States*, 195 U. S. 138 (1904); *Pollard* v. *Lyon*, 91 U. S. 225 (1875); *White* v. *Nicholls*, 44 U. S. (3 How.) 266 (1845).

The Court's consistent view prior to *New York Times* v. *Sullivan*, *supra*, was that defamatory utterances were wholly unprotected by the First Amendment. In *Patterson* v. *Colorado*, 205 U. S. 454, 462 (1907), for example, the Court said that although freedom of speech and press is protected from abridgement by the Constitution, these provisions "do not prevent the subsequent punishment of such as may be deemed contrary to the public welfare." This statement was repeated in *Near* v. *Minnesota*, 283 U. S. 697, 714 (1931), the Court adding:

> "But it is recognized that punishment for the abuse of the liberty accorded to the press is essential to the protection of the public, and that the common law rules that subject the libeler to responsibility for the public offense, as well as for the private injury, are not abolished by the protection extended in our constitutions." *Id.*, at 715.

Chaplinsky v. *New Hampshire*, 315 U. S. 568, 571–572 (1941) (footnotes omitted), reflected the same view:

> "There are certain well-defined and narrowly limited classes of speech, the prevention and punish-

ment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace. It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality."

Beauharnais v. *Illinois*, 343 U. S. 250, 254–255, 256–257 (1952) (footnotes omitted), repeated the *Chaplinsky* statement, noting also that nowhere at the time of the adoption of the Constitution "was there any suggestion that the crime of libel be abolished." And in *Roth* v. *United States*, *supra*, 354 U. S., at 483 (footnote omitted), the Court further examined the meaning of the First Amendment:

"In light of this history, it is apparent that the unconditional phrasing of the First Amendment was not intended to protect every utterance. This phrasing did not prevent this Court from concluding that libelous utterances are not within the area of constitutionally protected speech. *Beauharnais* v. *Illinois*, 343 U. S. 250, 266. At the time of the adoption of the First Amendment, obscenity law was not as fully developed as libel law, but there is sufficiently contemporaneous evidence to show that obscenity, too, was outside the protection intended for speech and press." [21]

[21] For further expressions of the general proposition that libels are not protected by the First Amendment, see *Koningsberg* v. *State Bar of California*, 366 U. S. 36, 49–50 & n. 10 (1961); *Times Film Corp.* v. *City of Chicago*, 365 U. S. 43, 48 (1961); *Pennekamp* v.

The Court could not accept the generality of this historic view in *New York Times* v. *Sullivan, supra*. There the Court held that the First Amendment was intended to forbid actions for seditious libel and that defamation actions by public officials were therefore not subject to the traditional law of libel and slander. If these officials (and, later, public figures occupying semiofficial or influential, although private, positions) were to recover, they were required to prove not only that the publication was false but also that it was knowingly false or published with reckless disregard for its truth or falsity. This view that the First Amendment was written to forbid seditious libel reflected one side of the dispute that raged at the turn of the nineteenth century [22] and also mirrowed the views of some later scholars.[23]

The central meaning of *New York Times*, and for me the First Amendment as it relates to libel laws, is that seditious libel—criticism of government and public officials—falls beyond the police power of the State. 376 U. S., at 273–276.[24] In a democratic society such as ours, the citizen has the privilege of criticizing his government and its officials. But neither *New York Times* nor its progeny suggest that the First Amendment intended in all circumstances to deprive the private citizen of his historic recourse to redress published falsehoods damaging to reputation or that, contrary to history and precedent, the amendment should now be so interpreted. Simply put, the First Amendment did not confer a "license to defame

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Florida, 328 U. S. 331, 348–349 (1946); cf. *Paris Adult Theatre I* v. *Slaton*, 413 U. S. 49, 67 (1973); *Stanley* v. *Georgia*, 394 U. S. 557, 561 n. 5 (1969).

[22] See L. Levy, *supra*, n. 13, at 247–248.

[23] See, *e. g.*, *Abrams* v. *United States*, 250 U. S. 616, 630 (1919) (Holmes, J., dissenting).

[24] Kalven, The New York Times Case: A Note on "The Central Meaning of the First Amendment," 1964 Sup. Ct. Rev. 191, 208, 209,

the citizen." W. O. Douglas, The Right of the People 38 (1958).

I labor the foregoing matters not to contend that the Court is foreclosed from reconsidering prior interpretations of the First Amendment.[25] But the Court apparently finds a clean slate where in fact we have instructive historical experience dating from long before the first settlers, with their notions of democratic government and human freedom, journeyed to this land. Given this rich background of history and precedent and because we deal with fundamentals when we construe the First Amendment, we should proceed with care and be presented with more compelling reasons before we jettison the settled law of the States to an even more radical extent.[26]

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[25] "The language of the First Amendment is to be read not as barren words found in a dictionary but as symbols of historic experience illumined by the presuppositions of those who employed them . . . . As in the case of every other provision of the Constitution that is not crystallized by the nature of technical concepts, the fact that the First Amendment is not self-defining and self-enforcing neither impairs its usefulness nor compels its paralysis as a living instrument." *Dennis* v. *United States*, 341 U. S. 494, 523 (1951) (Frankfurter, J., concurring).

[26] "[T]he law of defamation has been an integral part of the laws of England, the colonies and the states since time immemorial. So many actions have been maintained and judgments recovered under the various laws of libel that the Constitutional validity of libel actions could be denied only by a Court willing to hold all of its predecessors were wrong in the interpretation of the First Amendment and that two hundred years of precedent should be overruled." Rutledge, The Law of Defamation: Recent Developments, 32 Alabama Lawyer 409, 410 (1971).

The prevailing common law libel rules in this country have remained in England and the Commonwealth nations. Pedrick, Freedom of the Press and the Law of Libel: The Modern Revised Translation, 49 Corn. L. Q. 581, 583–584 (1964). After many years of reviewing the English law of defamation, the Porter Committee concluded that "though the law as to defamation requires some modification,

III

The Court concedes that the dangers of self-censorship are insufficient to override the state interest in protecting the reputation of private individuals who are both more helpless and more deserving of state concern than public persons with more access to the media to defend themselves. It therefore refuses to condition the private plaintiff's recovery on a showing of intentional or reckless falsehood as required by *New York Times*. But the Court nevertheless extends the reach of the First Amendment to all defamation actions by requiring that the ordinary citizen, when libeled by a publication defamatory on its face, must prove some degree of culpability on the part of the publisher beyond the circulation to the public of a damaging falsehood. A rule at least as strict would be called for where the defamatory character of the publication is not apparent from its face. *Ante*, at 23–24.[27] Furthermore, if this major hurdle to establish liability is surmounted, the Court requires proof of actual injury to reputation before any damages for such injury may be awarded.

The Court proceeds as though it were writing on *tabula rasa* and suggests that it must mediate between two unacceptable choices—on the one hand, the rigors of the *New York Times* rule which the Court thinks would give insufficient recognition to the interest of the private plaintiff, and, on the other hand, the prospect of imposing "liability without fault" on the press and others who are charged with defamatory utterances. Totally

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the basic principles upon which it is founded are not amiss." Report of the Committee on the Law of Defamation ¶ 222, at 48 (1948).

[27] If I read the Court correctly, it clearly implies that for those publications that do not make "substantial danger to reputation apparent," the *New York Times* actual malice standard will apply. Apparently, this would be true even where the imputation concerned conduct or a condition that would be *per se* slander.

ignoring history and settled First Amendment law, the Court purports to arrive at an "equitable compromise," rejecting both what it considers faultless liability and *New York Times* malice, but insisting on some intermediate degree of fault. Of course, the Court necessarily discards the contrary judgment arrived at in the 50 States that the reputation interest of the private citizen is deserving of considerably more protection.

The Court evinces a deep-seated antipathy to "liability without fault." But this catch-phrase has no talismanic significance and is almost meaningless in this context where the Court appears to be addressing those libels and slanders that are defamatory on their face and where the publisher is no doubt aware from the nature of the material that it would be inherently damaging to reputation. He publishes notwithstanding, knowing that he will inflict injury. With this knowledge, he must intend to inflict that injury, his excuse being that he is privileged to do so—that he has published the truth. But as it turns out, what he has circulated to the public is a very damaging falsehood. Is he nevertheless "faultless?" Perhaps it can be said that the mistake about his defense was made in good faith, but the fact remains that it is he who launched the publication knowing that it could ruin a reputation.

In these circumstances, the law has heretofore put the risk of falsehood on the publisher where the victim is a private citizen and no grounds of special privilege are invoked. The Court would now shift this risk to the victim, even though he has done nothing to invite the calumny, is wholly innocent of fault, and is helpless to avoid his injury. I doubt that jurisprudential resistance to liability without fault is sufficient ground for employing the First Amendment to revolutionize the law of libel, and in my view, that body of legal rules poses no realistic threat to the press and its service to the public.

The press today is vigorous and robust. To me, it is quite incredible to suggest that threats of libel suits from private citizens are causing the press to refrain from publishing the truth. I know of no hard facts to support that proposition, and the Court furnishes none.

The communications industry has increasingly become concentrated in a few powerful hands operating very lucrative businesses reaching across the Nation and into almost every home.[28] Neither the industry as a whole nor

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[28] A recent study has comprehensively detailed the role and impact of mass communications in this nation. See Note, Media and the First Amendment in a Free Society, 60 Geo. L. J. 867 (1972). For example, 99% of the American households have a radio, and 77% hear at least one radio newscast daily. In 1970, the yearly average home television viewing time was almost six hours per day. *Id.*, at 883 n. 53.

'Sixty years ago, 2,442 newspapers were published daily nationwide, and 689 cities had competing dailies. Today, in only 42 of the cities served by one of the 1,748 American daily papers is there a competing newspaper under separate ownership. Total daily circulation has passed 62 million copies, but over 40 percent of this circulation is controlled by only 25 ownership groups.

"Newspaper owners have profited greatly from the consolidation of the journalism industry. Several of them report yearly profits in the tens of millions of dollars, with after tax profits ranging from seven to 14 percent of gross revenues. Unfortunately, the owners have made their profits at the expense of the public interest in free expression. As the broad base of newspaper ownership narrows, the variation of facts and opinions received by the public from antagonistic sources is increasingly limited. Newspaper publication is indeed a leading American industry. Through its evolution in this direction, the press has come to be dominated by a select group whose prime interest is economic.

"The effect of consolidation within the newspaper industry is magnified by the degree of intermedia ownership. Sixty-eight cities have a radio station owned by the only local daily newspaper, and 160 television stations have newspaper affiliations. In 11 cities diversity of ownership is completely lacking with the only television station and newspaper under the same control." *Id.*, at 892–893

its individual components are easily intimidated, and we are fortunate that they are not. Requiring them to pay for the occasional damage they do to private reputation will play no substantial part in their future performance or their existence.

In any event, if the Court's principal concern is to protect the communications industry from large libel judgments, it would appear that its new requirements with respect to general and punitive damages would be ample protection. Why it also feels compelled to escalate the threshold standard of liability I cannot fathom, particularly when this will eliminate in many instances the plaintiff's possibility of securing a judicial determination that the damaging publication was indeed false, whether or not he is entitled to recover money damages. Under the Court's new rules, the plaintiff must prove not only the defamatory statement but also some degree of fault accompanying it. The publication may be wholly false and the wrong to him unjustified, but his case will nevertheless be dismissed for failure to prove negligence or other fault on the part of the publisher. I find it unacceptable to distribute the risk in this manner and force the wholly innocent victim to bear the injury; for, as between the two, the defamer is the only culpable party. It is he who circulated a falsehood that he was not required to publish.

It is difficult for me to understand why the ordinary citizen should himself carry the risk of damage and suffer the injury in order to vindicate First Amendment values by protecting the press and others from liability for circulating false information. This is particularly true because such statements serve no purpose whatsoever in furthering the public interest or the search for truth

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(footnotes omitted). See also Congress, FCC Consider Newspaper Control of Local TV, XXXII Cong. Q. 659–663 (March 16, 1974).

but, on the contrary, may frustrate that search and at the same time inflict great injury on the defenseless individual. The owners of the press and the stockholders of the communications enterprises can much better bear the burden. And if they cannot, the public at large should somehow pay for what is essentially a public benefit derived at private expense.

IV

A

Not content with escalating the threshhold requirements of establishing liability, the Court abolishes the ordinary damages rule, undisturbed by *New York Times* and later cases, that, as to libels or slanders defamatory on their face, injury to reputation is presumed and general damages may be awarded along with whatever special damages may be sought. Apparently because the Court feels that in some unspecified and unknown number of cases, plaintiffs recover where they have suffered no injury or recover more than they deserve, it dismisses this rule as an "oddity of tort law." The Court thereby refuses in *any* case to accept the fact of wide dissemination of a *per se* libel as prima facie proof of injury sufficient to survive a motion to dismiss at the close of plaintiff's case.

I have said before, but it bears repeating, that even if the plaintiff should recover no monetary damages, he should be able to prevail and have a judgment that the publication is false. But beyond that, courts and legislatures literally for centuries have thought that in the generality of cases, libeled plaintiffs will be seriously shortchanged if they must prove the extent of the injury to their reputations. Even where libels or slanders are not on their face defamatory and special damages must be shown, when that showing is made, general damages

for reputation injury are recoverable without specific proof.[29]

The Court is clearly right when at one point it states that "the law of defamation is rooted in our experience that the truth rarely catches up with a lie." *Ante*, at 20, n. 9. But it ignores what that experience teaches, *viz.*, that damage to reputation is recurringly difficult to prove and that requiring actual proof would repeatedly destroy any chance for adequate compensation. Eminent authority has warned that

> "it is clear that proof of actual damage will be impossible in a great many cases where, from the character of the defamatory words and the circumstances of publication it is all but certain that serious harm has resulted in fact." W. Prosser, *supra*, n. 1, § 112, at 765.[30]

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[29] Having held that the defamation plaintiff is limited to recovering for "actual injury," the Court hastens to add:

"Suffice it to say that actual injury is not limited to out-of-pocket loss. Indeed, the more customary types of actual harm inflicted by defamatory falsehood include impairment of reputation and standing in the community, personal humiliation, and mental anguish and suffering." *Ante*, at 25.

It should be pointed out that under the prevailing law, where the defamation is not actionable *per se* and proof of "special damages" is required, a showing of actual injury to reputation is insufficient; but if pecuniary loss is shown, general reputation damages are recoverable. The Court changes the latter, but not the former, rule. Also under present law, pain and suffering, although shown, do not warrant damages in any defamation action unless the plaintiff is otherwise entitled to at least nominal damages. By imposing a more difficult standard of liability and requiring proof of actual damage to reputation, recovery for pain and suffering, though real, becomes a much more remote possibility.

[30] "The harm resulting from an injury to reputation is difficult to demonstrate both because it may involve subtle differences in the conduct of the recipients toward the plaintiff and because the

The Court fears uncontrolled awards of damage by juries, but that not only denigrates the good sense of most jurors—it fails to consider the role of trial and appellate courts in limiting excessive jury verdicts where no reasonable relationship exists between the amount awarded and the injury sustained.[31] Available information tends to confirm that American courts have ably discharged this responsibility.[32]

The new rule with respect to general damages appears to apply to all libels or slanders, whether defamatory on their face or not, except, I gather, when the plaintiff proves intentional falsehood or reckless disregard. Although the impact of the publication on the victim is

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recipients, the only witnesses able to establish the necessary causal connection, may be reluctant to testify that the publication affected their relationships with the plaintiff. Thus some presumptions are necessary if the plaintiff is to be adequately compensated." Note, Developments in the Law—Defamation, 69 Harv. L. Rev. 875, 891–892 (1956).

[31] "On questions of damages, the judge plays an important role. It is, of course, for him to determine and instruct the jury as to what matters may be taken into consideration by them in arriving at a verdict since such questions are clearly matters of substantive law. But the judge also may and frequently does exercise a judgment as to the amount of damages the plaintiff may recover. His function here is primarily to keep the jury within bounds of reason and common sense, to guard against excessive verdicts dictated by passion and prejudice and to see to it that the amount of the verdict has some reasonable relation to the plaintiff's evidence as to his loss or the probability of loss. Thus, the trial judge may grant a new trial or the appellate court may reverse and remand the case for a new trial because of excessive damages or, as is more frequently the case, a remittitur may be ordered, the effect of which is that the plaintiff must accept a specified reduction of his damages or submit to a new trial on the issue of liability as well as damages." 1 F. Harper & F. James, Jr., The Law of Torts § 5.29, at 467 (1956) (footnote omitted).

[32] See Pedrick, *supra*, n. 26, at 587 n. 23.

the same, in such circumstances the injury to reputation may apparently be presumed in accordance with the traditional rule. Why a defamatory statement is more apt to cause injury if the lie is intentional than when it is only negligent, I fail to understand. I suggest that judges and juries who must live by these rules will find them equally incomprehensible.

B

With a flourish of the pen, the Court also discards the prevailing rule in libel and slander actions that punitive damages may be awarded on the classic grounds of common law malice, that is, "'[a]ctual malice' in the sense of ill will or fraud or reckless indifference to consequences." C. McCormick, *supra,* n. 4 § 118, at 431; see also W. Prosser, *supra,* n. 1, § 113, at 772; 1 A. Hanson, *supra,* n. 1 ¶ 163, at 133; Note, Developments in the Law—Defamation, 69 Harv. L. Rev. 875, 938 (1956); Cal. Civ. Code § 48a (4)(d). In its stead, the Court requires defamation plaintiffs to show intentional falsehood or reckless disregard for the truth or falsity of the publication. The Court again complains about substantial verdicts and the possibility of press self-censorship, saying that punitive damages are merely "private fines leveled by civil juries to punish reprehensible conduct and to deter its future occurrence." *Ante,* at 26. But I see no constitutional difference between publishing with reckless disregard for the truth, where punitive damages will be permitted, and negligent publication where they will not be allowed. It is difficult to understand what is constitutionally wrong with assessing punitive damages to deter a publisher from departing from those standards of care ordinarily followed in the publishing industry, particularly if common law malice is also shown.

I note also the questionable premise that "juries assess punitive damages in wholly unpredictable amounts bearing no necessary relation to the actual harm caused." *Ante*, at 26. This represents an inaccurate view of established practice, "another of those situations in which judges, largely unfamiliar with the relatively rare actions for defamation, rely on words without really going behind them . . . ." [33] While a jury award in any type of civil case may certainly be unpredictable, trial and appellate courts have been increasingly vigilant in ensuring that the jury's result is "based upon a rational consideration of the evidence and a proper application of the law." *Reynolds* v. *Pegler*, 123 F. Supp. 36, 39 (SDNY 1954), aff'd, 223 F. 2d 429 (CA2 1955), cert. denied, 350 U. S. 846 (1955). See nn. 31–32, *supra*. Moreover, some courts require that punitive damages bear a reasonable relation to the compensatory damage award.[34] Still others bar common law punitive damages or condition their award on a refusal to print a retraction.[35]

> "The danger . . . of immoderate verdicts is certainly a real one, and the criterion to be applied by the judge in setting or reducing the amount is concededly a vague and subjective one. Nevertheless, the verdict may be twice submitted by the complaining defendant to the common sense of trained judicial minds, once on motion for new trail and again on appeal, and it must be a rare instance when an unjustifiable award escapes correction." C. McCormick, *supra*, n. 4, § 77, at 278.

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[33] Murnaghan, *supra*, n. 3, at 29.

[34] Note, Developments on the Law—Defamation, 69 Harv. L. Rev. 875, 938 & n. 443 (1956).

[35] *Id.*, at 939, 941–942. See, *e. g.*, Cal. Civ. Code § 48a (2).

The court points to absolutely no empirical evidence to substantiate its premise. For my part, I would require something more substantial than an undifferentiated fear of unduly burdensome punitive damage awards before retooling the established common-law rule and depriving the States of the opportunity to experiment with different methods for guarding against abuses.

Even assuming the possibility that some verdicts will be "excessive," I cannot subscribe to the Court's remedy. On its face it is a classic example of judicial overkill. Apparently abandoning the salutary *New York Times* policy of case-by-case " 'independent examination of the whole record' . . . so as to assure ourselves that the judgment does not constitute a forbidden intrusion on the field of free expression," [36] the Court substitutes an inflexible rule barring recovery of punitive damages absent proof of constitutional malice. The First Amendment is a majestic statement of a free people's dedication to "uninhibited, robust, and wide-open" debate on public issues,[37] but we do it a grave disservice when we needlessly spend its force.[38] For almost 200 years, punitive damages and the First Amendment have peacefully coexisted. There has been no demonstration that state libel laws as they relate to punitive damages necessitate the majority's extreme response. I fear that those who read the Court's decision will find its words inaudible, for the Court speaks "only [with] a voice of power, not of reason." *Mapp* v. *Ohio*, 367 U. S. 643, 686 (1961) (Harlan, J., dissenting).

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[36] 376 U. S., at 285.

[37] *Id.*, at 270.

[38] Judicial review of jury libel awards for excessiveness should be influenced by First Amendment considerations, but it makes little sense to discard an otherwise useful and time-tested rule because it might be misapplied in a few cases.

V

In disagreeing with the Court on the First Amendment's reach in the area of state libel laws protecting nonpublic persons, I do not repudiate the principle that the First Amendment "rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public, that a free press is a condition of a free society." *Associated Press* v. *United States*, 326 U. S. 1, 20 (1945); see also *The Miami Herald Publishing Co.* v. *Tornillo*, *post*, at — (concurring opinion). I continue to subscribe to *New York Times* and those decisions extending its protection to defamatory falsehoods about public persons. My quarrel with the Court stems from its willingness "to sacrifice good sense to a syllogism" [39]—to find in the *New York Times* doctrine an infinite elasticity. Unfortunately, this expansion is the latest manifestation of the destructive potential of any good idea carried out to its logical extreme.

Recovery under common law standards for defamatory falsehoods about a private individual, who enjoys no "general fame or notoriety in the community," who is not "pervasive[ly] involve[d] in the affairs of society," and who does not "thrust himself into the vortex of [a given] public issue . . . in an attempt to influence its outcome," [40] is simply not forbidden by the First Amendment. A distinguished private study group put it this way:

> "Accountability, like subjection to law, is not necessarily a net subtraction from liberty . . . . The First Amendment was intended to guarantee free expression, not to create a privileged industry." Commission on Freedom of the Press, A Free and Responsible Press 130, 81 (1947).

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[39] O. Holmes, The Common Law 36 (1881).

[40] *Ante*, at 27, 28.

I fail to see how the quality or quantity of public debate will be promoted by further emasculation of state libel laws for the benefit of the news media.[41] If anything, this trend may provoke a new and radical imbalance in the communications process. Cf. Barrow, Access to the Press—A New First Amendment Right, 80 Harv. L. Rev. 1641, 1657 (1967). It is not at all inconceivable that virtually unrestrained defamatory remarks about private citizens will discourage them from speaking out and concerning themselves with social problems. This would turn the First Amendment on its head. Note, The Scope of First Amendment Protection for Good-Faith Defamatory Error, 75 Yale L. J. 642, 649 (1966); Merin, *supra*, n. 11, at 418. David Riesman, writing in the midst of World War II on the fascists' effective use of defamatory attacks on their opponents, commented: "Thus it is that the law of libel, with its ecclesiastic background and domestic character, its aura of heart-balm suits and crusading nineteenth-century editors, becomes suddenly important for modern democratic survival." Riesman, Democracy and Defamation: Fair Game and Fair Comment I, 42 Col. L. Rev. 1085, 1088 (1942).

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[41] Cf. Pedrick, *supra*, n. 26, at 601–602.

"A great many forces in our society operate to determine the extent to which men are free in fact to express their ideas. Whether there is a privilege for good faith defamatory misstatements on matters of public concern or whether there is strict liability for such statements may not greatly affect the course of public discussion. How different has life been in those states which heretofore followed the majority rule imposing strict liability for misstatements of fact defaming public figures from life in the minority states where the good faith privilege held sway?"

See also T. Emerson, The System of Freedom of Expression 519 (1970) (footnote omitted): "[O]n the whole the role of libel law in the system of freedom of expression has been relatively minor and essentially erratic."

This case ultimately comes down to the importance the Court attaches to society's "pervasive and strong interest in preventing and redressing attacks upon reputation." *Rosenblatt* v. *Baer, supra,* 383 U. S., at 86. From all that I have seen, the Court has miscalulated and denigrates that interest at a time when escalating assaults on individuality and personal dignity counsel otherwise.[42] At the very least, the issue is highly debatable, and the Court has not carried its heavy burden of proof to justify tampering with state libel laws.[43]

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[42] "The man who is compelled to live every minute of his life among others and whose every need, thought, desire, fancy or gratification is subject to public scrutiny, has been deprived of his individuality and human dignity. Such an individual merges with the mass. His opinions, being public, tend never to be different; his aspirations, being known, tend always to be conventionally accepted ones; his feelings, being openly exhibited, tend to lose their quality of unique personal warmth and to become the feelings of every man. Such a being, although sentient, is fungible; he is not an individual." Bloustein, Privacy As an Aspect of Human Dignity: An Answer to Dean Prosser, 39 N. Y. U. L. Rev. 962, 1003 (1964).

[43] With the evisceration of the common law libel remedy for the private citizen, the Court removes from his legal arsenal the most effective weapon to combat assault on personal reputation by the press establishment. The David and Goliath nature of this relationship is all the more accentuated by the Court's holding today in *The Miami Herald Publishing Co.* v. *Tornillo, post,* which I have joined, that an individual criticized by a newspaper's editorial is precluded by the First Amendment from requiring that newspaper to print his reply to that attack. While that case involves an announced candidate for public office, the Court's finding of a First Amendment barrier to government "intrusion into the function of editors," *post,* at 16, does not rest on any distinction between private citizens or public officials. In fact, the Court observes that the First Amendment clearly protects from governmental restraint "the exercise of editorial control and judgment," *i. e.*, "[t]he choice of material to go into a newspaper, and the decisions made as to limitations on the size of the paper, and content, and treatment of *public issues and*

While some risk of exposure "is a concomitant of life in a civilized community," *Time, Inc.* v. *Hill*, 385 U. S. 374, 388 (1967), the private citizen does not bargain for defamatory falsehoods. Nor is society powerless to vindicate unfair injury to his reputation.

> "It is a fallacy . . . to assume that the First Amendment is the only guidepost in the area of state defamation laws. It is not. . . .
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> "The right of a man to the protection of his own reputation from unjustified invasion and wrongful hurt reflects no more than our basic concept of the essential dignity and worth of every human being—a concept at the root of any decent system of ordered liberty. The protection of private personality, like the protection of life itself, is left primarily to the individual States under the Ninth and Tenth

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public officials—whether fair or unfair . . . ." *Ibid.* (Emphasis added.)

We must, therefore, assume that the hapless ordinary citizen libeled by the press (a) may not enjoin in advance of publication a story about him, regardless of how libelous it may be, *Near* v. *Minnesota*, 283 U. S. 697 (1931); (b) may not compel the newspaper to print his reply; and (c) may not force the newspaper to print a retraction, because a judicially-compelled retraction, like a "remedy such as an enforceable right of access," entails "governmental coercion" as to content, which "at once brings about a confrontation with the express provisions of the First Amendment and the judicial gloss on that amendment developed over the years." *The Miami Herald Publishing Co.* v. *Tornillo*, *post*, at 12; but cf. *Gertz* v. *Robert Welch, Inc.*, at 8–9, n. 3 (BRENNAN, J., dissenting).

My Brother BRENNAN also suggests that there may constitutionally be room for "the possible enactment of statutes, not requiring proof of fault, which provide . . . for publication of a court's determination of falsity if the plaintiff is able to demonstrate that false statements have been published concerning his activities." *Ibid.* The Court, however, does not even consider this less drastic alternative to its new "some fault" libel standards.

Amendments. But this does not mean that the right is entitled to any less recognition by this Court as a basic of our constitutional system." *Rosenblatt* v. *Baer*, *supra*, 383 U. S., at 92 (STEWART, J., concurring).

The case against razing state libel laws is compelling when considered in light of the increasingly prominent role of mass media in our society and the awesome power it has placed in the hands of a select few.[44] Surely, our political "system cannot flourish if regimentation takes hold." *Public Utilities Commission* v. *Pollak*, 343 U. S. 451, 469 (1952) (DOUGLAS, J., dissenting). Nor can it survive if our people are deprived of an effective method of vindicating their legitimate interest in their good names.[45]

Freedom and human dignity and decency are not antithetical. Indeed, they cannot survive without each other. Both exist side-by-side in precarious balance, one always threatening to overwhelm the other. Our experience as a Nation testifies to the ability of our democratic institutions to harness this dynamic tension. One of the mechanisms seized upon by the common law to accommodate these forces was the civil libel action tried before a jury of average citizens. And it has essentially fulfilled its role. Not because it is necessarily the best or only answer, but because

"the juristic philosophy of the common law is at bottom the philosophy of pragmatism. Its truth

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[44] See n. 28, *supra*.

[45] "No democracy[,] . . . certainly not the American democracy, will infinitely tolerate concentration of private power irresponsible and strong enough to thwart the aspirations of the people. Eventually governmental power will be used to regulate private power—if private power is at once great and irresponsible." Commission on Freedom of the Press, A Free and Responsible Press 80 (1947).

is relative, not absolute. The rule that functions well produces a title deed to recognition." B. Cardozo, The Nature of the Judicial Process, in M. Hall (ed.), Selected Writings of Benjamin Cardozo 149 (1947).

In our federal system, there must be room for allowing the States to take diverse approaches to these vexing questions. We should "continue to forbear from fettering the States with an adamant rule which may embarrass them in coping with their own peculiar problems . . . ." *Mapp* v. *Ohio*, *supra*, 367 U. S., at 681 (Harlan, J., dissenting); see also Murnaghan, *supra*, n. 3, at 38. Cf. *Younger* v. *Harris*, 401 U. S. 37, 44–45 (1971). Whether or not the course followed by the majority is wise, and I have indicated my doubts that it is, our constitutional scheme compels a proper respect for the role of the States in acquitting their duty to obey the Constitution. Finding no evidence that they have shirked this responsibility, particularly when the law of defamation is even now in transition, I would await some demonstration of the diminution of freedom of expression before acting.

For the foregoing reasons, I would reverse the judgment of the Court of Appeals and reinstate the jury's verdict.